TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 208.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

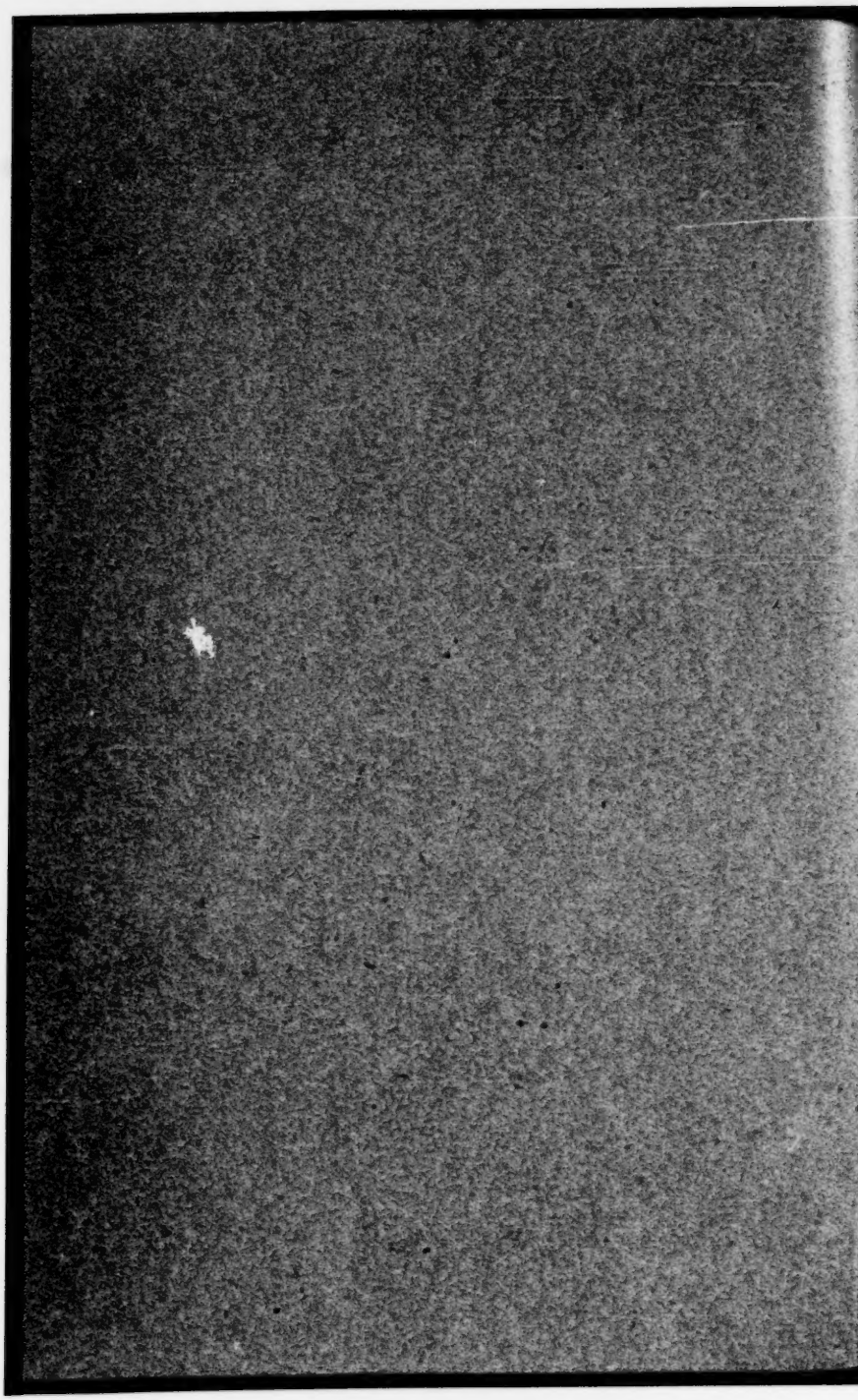
vs.

ALEXANDER REEDER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 20, 1898.

(16,347.)



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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1897.

1 & 2 UNITED STATES OF AMERICA, }
Fifth Judicial District. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, on the third Monday of November, A. D. 1895, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Hon. Emory Speer, United States district judge for the southern district of Georgia, and the Honorable Charles Parlance, United States district judge for the eastern district of Louisiana.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
v. }
ALEXANDER REEDER, Defendant in Error. }

Be it remembered that heretofore, to wit, on the 4th day of April, 1896, a transcript of the record of this cause from the circuit court of the United States for the eastern district of Texas was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit in the words and figures following, to wit:

3 *Caption.*

Be it remembered, that on Wednesday, the 4th day of February, A. D. 1896, in the circuit court of the United States for the eastern district of Texas, at Jefferson, Texas, January term of said court, begun and held on the 27th day of January, A. D. 1896, and ending on February 5th, A. D. 1896, the following proceedings were had in a suit pending in said court, No. 435, Alexander Reeder *vs.* The Texas & Pacific Railway Company, to wit:

THE STATE OF TEXAS, }
County of Marion. }

At a term of the district court begun and holden at the city of Jefferson, within and for the county of Marion, before the Hon. John L. Sheppard, and ending on the 27th day of June, A. D. 1895, the following case came on for trial, to wit:

In the District Court, Marion County, Texas, to the June Term of said Court, 1895.

ALEXANDER REEDER
vs.
TEXAS & PACIFIC RAILWAY CO.

ALEXANDER REEDER
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 6335.

To the honorable judge of said court:

Your petitioner, Alexander Reeder, who is a resident citizen
4 of the State of Kansas, complaining of the Texas & Pacific Railway Company, a corporation duly created by the laws of the United States of America, would respectfully represent unto your honor as follows, to wit:

That the defendant is a corporation engaged in the transportation of passengers, goods and property, including live stock, as a common carrier of same, on its certain railroad, owned and operated by defendant, a portion of which extends from Texarkana, Texas, to Longview, Texas, and defendant was so engaged in the operation of said railroad and portion of same above referred to as such common carrier on, to wit, the 22d day of October, 1894, when the injury to plaintiff herein complained of occurred.

The plaintiff having a few days before started from Scottsville, Kansas, for Houston, Texas, with a car load of horses and cows, reached Texarkana, Texas, with the same in safety and in good condition, reasonable care having up to that time been exercised by the employees of the various railroads over which said car had been transported to that point. That at said point the car containing said horses and cows was taken in charge of by the defendant for the purpose of transporting same over defendant's said line of railroad from Texarkana to Longview, and that plaintiff in accordance with the custom theretofore pursued by him, it being the usual and customary manner under the circumstances, continued to remain with said horses and cows in the car occupied by them while the same was being transported from Texarkana to Longview, with the knowledge and consent of defendant.

That the engineer and employees of defendant, who were operating said train of which said car formed a part, failed to exercise reasonable care and diligence in the handling of said train after it left Texarkana, Texas, and did on many occasions before the same reached Longview, subject the cars in which the plaintiff was riding with said horses and cows as aforesaid to jerks and jolts and shocks and of great and unnecessary violence, whereby said stock in plaintiff's charge were repeatedly thrown from their feet upon the
5 floor of the car in which they were being transported. And defendant's said employees did persist in such reckless and unnecessary violence in the operation of said train notwithstanding that they were aware of plaintiff being in said car with said horses and cows, and notwithstanding his repeated protest against such

unnecessary violence on the part of said employees, and notwithstanding his repeated requests to them to exercise greater care; that on one occasion, and just before said train reached Longview, the car in which plaintiff was riding as aforesaid, was so violently jerked as to cause all or nearly all of said horses and cows in said car to be thrown from their feet upon the floor of same, and that while plaintiff was engaged in trying to get them upon their feet again, said car was subjected to another jolt and jar of extraordinary severity, and of a far more violent character than any which had preceded it, the same having been caused by the engineer in charge of said train starting or stopping or moving the same or a portion of same with unnecessary abruptness and violence; that when last-mentioned jolt occurred plaintiff was standing with his feet securely braced for the purpose of guarding against any sudden movement of the car, but that the jolt last referred to was one of extraordinary severity, and when it occurred plaintiff grasped an iron bar or hand hold fastened to the car, and was swung around upon the same with such force and violence as to tear his right arm from its socket, and to dislocate the same, and to inflict upon him bodily injuries otherwise of a most serious and permanent character, notwithstanding the precaution taken by plaintiff to prevent his being thrown from his feet, whereby he was injured in person as aforesaid, without fault or negligence on his part, but through and on account of the negligence and carelessness of the defendant company, its agents and employees as aforesaid.

And plaintiff alleges that when said accident occurred he was riding in said car on a drover's pass with the knowledge,
6 acquiescence and consent of defendant as aforesaid, and for which defendant had received a valuable consideration.

The plaintiff's arm has been almost entirely rendered useless by reason of said accident, and plaintiff's capacity to earn a living has been greatly impaired on account thereof, and that he has been subjected to great physical pain and suffering and mental anguish on account thereof, to his damage in the sum of ten thousand dollars.

The premises considered, plaintiff prays that the defendant be cited as the law provides, to answer this petition, and that on final hearing he have and recover of the defendant judgment in the said sum of ten thousand dollars, and costs of suit and all other relief, both general and special, to which he may be entitled, and plaintiff will ever pray, etc.

EWING & RING,
Attorneys for Plaintiff.

Original petition.
Filed January 28th, 1895.

L. B. WEBSTER, *Clerk.*

In the District Court of Marion County, Texas, Fifth Judicial District.

ALEXANDER REEDER
vs.
TEXAS & PACIFIC RAILWAY CO.

Petition for Removal.

The petition of the Texas and Pacific Railway Company respectfully shows to the court:

First. That the Texas and Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to wit: "An act to incorporate the Texas and Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871, and
7 acts amendatory thereof and supplemental thereto, including an act approved May 2d, 1872, whereby, among other things, the name, style and title of said Texas and Pacific Railroad Company was changed to "the Texas and Pacific Railway Company."

Second. That the above-entitled action was commenced in the above-named court on the 28th day of January, 1895, and citation issuing therein was served upon the defendant on the 29th day of May, 1895, which said citation is returnable on the second Monday in June, 1895, it being the 10th day of June, and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of the plaintiff before the 11th day of June, 1895.

Third. That the matter in dispute in this case exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and this suit arises under the laws of the United States, as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff for $10,000.00 damages for personal injuries, alleging that on the 22d day of October, 1894, he was traveling with stock from Scottsville, Kansas, to Houston, Texas, and that between Texarkana and Longview he was injured by the rough handling of plaintiff's cars, and had his arm wrenched from its socket; with prayer for judgment, as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action; that this suit against this defendant is a suit arising under the laws of the United States, and more specially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3d, 1871, entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and acts amendatory thereof and supplemental thereto, approved respectively on May 2d, 1872, March 3d, 1873, and June 22d, 1874.

8 Fourth. That the above-entitled action is a civil suit, arising under the laws of the United States, of which the circuit court

of the United States for the eastern district of Texas is given original jurisdiction by act of Congress, approved March 3d, 1887, to wit: an act entitled "An act to amend the act of Congress, approved March 3d, 1875, entitled, 'An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,'" and the acts of Congress, approved August 13th, 1888, entitled, "An act to correct the enrollment of an act approved March 3d, 1887, entitled, An act to amend sections 1, 2, 3 and 10 of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the States courts, and for other purposes;" approved March 3d, 1875.

Your petitioner herewith presents and files a good and sufficient bond, conditioned that it will enter and file in the circuit court of the United States for the eastern district of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court, if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit if special bail was originally requisite therein.

Your petitioner therefore prays the said court to accept said petition and bond, and to remove this cause to the circuit court of the United States for the eastern district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By W. T. ARMISTEAD, *Attorney.*

Filed June 10th, 1895.

L. B. WEBSTER, *Clerk.*

STATE OF TEXAS,)
County of Marion.)

9 W. T. Armistead, being duly sworn, says that he is the agent of the Texas and Pacific Railway Company, being the attorney of said company; that the said Texas and Pacific Railway Company is a corporation organized under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts stated therein are true.

W. T. ARMISTEAD.

Sworn to and subscribed before me, this 10th day of June, 1895.

L. B. WEBSTER,
District Clerk.

Petition for removal.
Filed June 10th, 1895.

L. B. WEBSTER, *Clerk.*

In the District Court of Marion County, Texas, Fifth Judicial District.

ALEXANDER REEDER
vs.
TEXAS & PACIFIC R'Y CO.

Know all men by these presents: That the Texas and Pacific Railway Company as principal, and —— —— and —— —— as sureties, are held and firmly bound unto Alexander Reeder, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said Alexander Reeder, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that—

Whereas, the said The Texas and Pacific Railway Company has filed its petition in the district court of Marion county, for the removal of a certain cause therein pending, wherein Alexander Reeder is plaintiff and The Texas and Pacific Railway Company is defendant, said cause being numbered upon the docket of said court as No. 6335, to the circuit court of the United States for the eastern district of Texas.

10 Now, therefore, if the said The Texas — Pacific Railway Company shall enter in said circuit court of the United States for the eastern district of Texas, a copy of the record in said suit on the first day of the next session thereof, and shall pay all costs which may be awarded by said circuit court of the United States, if said court shall hold that — suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise of full force and effect.

Witness our hand- and seal- this 10th day of June, 1895.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By W. T. ARMISTEAD, *Its Attorney.*
J. D. CRAWFORD.
JNO. A. FIELDER.
S. A. SPELLINGS.

Approved this 11th day of June, 1895.

JOHN L. SHEPPARD,
Judge Fifth Judicial District.

Bond for removal.
Filed June 11th, 1895.

L. B. WEBSTER, *Clerk.*

ALEXANDER REEDER
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 6335.

This cause coming on this day to be heard, upon the petition of the Texas & Pacific Railway Company, to remove same to the circuit court of the United States for the eastern district of Texas, said

petition being heard by the court, and it appearing to the court that a good and sufficient bond has been filed, and that petition shows proper grounds for removal, the prayer of the said The
11 Texas & Pacific Railway Company, is granted and approved, and this cause ordered removed to the circuit court of the United States for the eastern district of Texas and the clerk of this court will make out a transcript of the record in this cause, to be filed in the United States court for the eastern district of Texas.

Order of removal.
Filed June 10th, 1895.

L. B. WEBSTER, *Clerk.*

In the U. S. Circuit Court, Eastern District of Texas, at Jefferson.

ALEXANDER REEDER
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 435.

Now comes The Texas and Pacific Railway Company, defendant, and by leave of the court amends its answer filed September 23, 1895, and demurs to the plaintiff's petition, and says the same is insufficient in law and prays judgment, etc.

And specially excepting thereto, defendant says said petition alleges that the defendant was incorporated under the laws of Texas when in truth and fact the court judiciously knows that the defendant was incorporated under the laws of the United States of America, and set forth in petition for removal.

W. T. ARMISTEAD,
Attorney for Defendant Co.

And for answer the said defendant company denies all and singular the allegations in the plaintiff's petition contained and says it is not guilty of the wrongs, injuries and trespasses charged against it and puts itself upon the country.

1. And specially answering herein, said defendant says, that the plaintiff was injured by his own acts, omissions and negli-
12 gence in riding in the stock car instead of in the caboose provided for such mode of transportation, as plaintiff was entitled to, and that by trying to lift up some of his stock which was down in the stock car, and while in the effort to lift said stock or animals, and the train being in rapid motion, *and* that he was injured by other stock being jostled and thrown against him in the car, and that all the acts aforesaid *was* negligence on his part, which contributed to and caused his injury.

2. And said defendant company, further answering herein, says that the alleged injury of which the plaintiff complains was one of his assumed risks incident to the nature of his contract, and the mode of his transportation, and that by the verbal rules and regulations and customs of defendant company, the plaintiff with "his drovers' pass," was entitled to and required to ride in the caboose which was provided for him, and that he was advised and notified

by the operatives and conductor of said train of the rules and regulations aforesaid, and that said plaintiff refused to ride in said caboose and got in the stock car with his stock and goods of his own choice and volition, and over the protest of the defendant, and that the stock car in which he was riding when hurt was more dangerous to ride in than the caboose, which was immediately behind and next to said stock car, and that if the said defendant had rode in the caboose, instead of the stock car, he would not have been hurt.

Wherefore, defendant says plaintiff cannot recover, because of his contributory negligence, and of the risk he assumed in riding in the stock car for his own convenience, instead of in the caboose, which was a less perilous position, and the said defendant prays for judgment, costs, etc., and for general relief.

W. T. ARMISTEAD,
Att'y for Defendant, Texas & Pacific Railway Co.

Endorsed: C. L. No. 435. Alexander Reeder *vs.* The Texas
13 & Pacific Railway Company. First amended answer of the defendant. Filed January 27th, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

In the U. S. Circuit Court, Eastern District of Texas.

ALEXANDER REEDER
vs.
TEXAS AND PACIFIC RAILWAY CO.

Now comes the plaintiff, and by leave of the court, first had and obtained, and files this, his first supplemental petition, in reply to the matter and things set up in the defendant's answer; and demurring to the said answer, says the same is wholly insufficient in law, and of this prays judgment.

An- especially excepting to the said answer, the said plaintiff says the same is insufficient.

1. In that part thereof wherein the defendant attempts to charge the plaintiff with a violation of the rules and regulations of the defendant company by riding in a car with the cattle, horses and household goods of the plaintiff, and that in riding in another car than the regular caboose attached to the train, that the plaintiff was violating the said rules and regulations of the said defendant company; because it does not appear from the said averment in said answer, how or when said rules were made, or established, or whether the same are or were, written, printed, or posted, so as to give to the public notice of the existence thereof; and because the said rules and regulations are not sufficiently pleaded and specified in said answer.

2. And in that part of said answer wherein the said defendant seeks to avoid liability for the injury sustained by the plaintiff, on the ground that the said plaintiff was injured while in a common box car, instead of being in the regular caboose attached to the train,

and in consequence of the said plaintiff riding in said car of
14 his own volition in violation of the rules and regulations of the said defendant company; because it is made to appear from the other averments in the said answer that the conductor and other employés of the defendant company knew of the fact that the plaintiff was so riding in said car, and that said employés in charge of said train permitted plaintiff to so ride in said car, and acquiesced in his so doing.

3. All that part of said answer which seeks to avoid liability on the part of the defendant, on the ground that the plaintiff assumed the risk incident to his transportation, in the manner in which he was traveling; because plaintiff cannot be held to have assumed the risk incident to the negligence of the defendant company; and there is no denial of the fact that plaintiff was a passenger on the defendant train at the time of his injury complained of, all of which the defendant prays judgment of the court.

And for reply, and answer to the several matter- set up in said answer, the plaintiff denies all and singular the said averments, and says he was not guilty of contributory negligence, or that he violated any rule or regulation of defendant company in traveling in the car in which *was* his said stock and household goods known to him, or of which he had any notice whatever; and denies all and singular, each and all of the several allegations therein, in said answer contained, except so far as they are corroborated by the facts stated in his original petition filed herein.

EWING & RING,
L. S. SCHLUTER,
Attorneys for Plaintiff.

Endorsed: Alexander Reeder *vs.* The Texas and Pacific Railway Company. Plaintiff's first supplemental petition. Filed January 28, 1895. C. Dart, clerk, by W. E. Singleton, deputy.

15 ALEXANDER REEDER
vs. } 435.
TEXAS & PACIFIC RAILWAY CO.

TUESDAY, *February* 4, 1896.

This cause being this day called for trial, came both the plaintiff and defendant and announced ready for trial. Thereupon came a jury of good and lawful men, to wit: J. D. Kitchen and eleven others, duly empaneled and sworn, who after hearing the evidence, argument of counsel and receiving the charge of the court, retired to consider of their verdict, and afterwards on the same day returned into open court the following verdict, to wit:

"We the jury find for the plaintiff and assess the damage at fifteen hundred dollars ($1,500.00); this the 4th day of February, 1896.

J. D. KITCHEN, *Foreman.*"

It is therefore ordered, adjudged and decreed by the court that the plaintiff, Alexander Reeder, do have and recover of, and from the defendant, Texas and Pacific Railway Company, the full sum of fifteen hundred dollars, together with all costs in this behalf incurred and expended, for all of which execution may issue.

It is further ordered that execution may issue against each party for all costs by them respectively incurred.

In the United States Circuit Court, Eastern District of Texas, at Jefferson.

ALEXANDER REEDER
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 435.

Statement of Facts.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following are the facts, and all the facts introduced in evidence:

Plaintiff offered in evidence the deposition of the plaintiff, Alexander Reeder.

16 Defendant objected on the ground that the witness is present in the court-room.

Objection overruled. Defendant excepted.

ALEXANDER REEDER, plaintiff, testified (by deposition taken February 21, 1895,) as follows:

My age is 70 years, residence Beloit, Mitchell Co., Kansas; I have no occupation at present. I left Scottsville, Kansas, at about 5 p. m. on October 22, 1894, on the train bound for Texas, and was riding in a car with three horses, two mules and five cows, and a lot of household goods; the car was a common box car, and reached a point near Longview, Texas, on the afternoon of October 25, 1894; I was riding in said car to look after the stock. I came down in the vicinity of Longview, Texas, about four or five o'clock p. m. on Thursday, October 25, 1894, and my destination was Houston, Texas. I had a pass which allowed me to ride in the car with the stock; I obtained the pass from the railroad agent at Scottsville, and was authorized to ride to Houston, Texas, and I rode in said car from four or five o'clock p. m. Monday evening, October 22, 1894, until four or five o'clock p. m. Thursday afternoon, October 25th, when I got to a point near Longview, Texas; I came through Kansas City, Mo., and through Little Rock, Ark., and through Texarkana; I did not leave the car, and cannot say when I arrived at the different points. I came down from Texarkana to Longview, and don't remember the names of the towns in Texas on the route, and had no time-card, and did not leave the car. When I got to Texarkana, everything in and about the stock was all right, and there had been no rough usage of them, and all was in good condition. At Texarkana the car was transferred to the Texas

and Pacific railroad; I was delayed about two hours in Texarkana, and then left for Longview, Texas. I don't remember the time I left for Longview, but I got into Longview about 5 o'clock p. m. October 25th, and was in the car with the stock from the time I left Texarkana until I reached Long-
17 view. I rode in the car to look after the stock, and to feed and water them, and see that none of them got down in the cars so that they could not get up or get hurt by others trampling on them while down; I have traveled with stock before, and found it best to ride in the car with them, for the reason above given, and so as to know where the car was all the time; one riding in the caboose could not readily locate a car of stock when the train was broken up and the car switched about in the yard at different places, and to remain in the car was therefore best for the stock; and the employees of the railroad who had control of the train knew that I was in the car with the stock; no one objected; I have several times travelled with stock in the same manner before, and it is usual and customary in going a long distance with stock and household goods in same car for a person accompanying them, to ride in the car with them as I did, and it was, and is, no unusual practice; they ride in the car to look after the stock, as I have above stated I did. After leaving Texarkana the road was very rough, and the cattle and horses were thrown down at least eight times by the sudden jerks made by the engine, and I called the brakeman on two or three different occasions, and told him to tell the engineer to use more care, that he was killing my stock; I could not see the conductor, but did so request the brakeman. I was injured a short distance from Longview, at about 5 o'clock p. m. on the 25th day of October, 1891; there is a steep grade near Longview, and the train stalled, and the engineer, in trying to get headway, would back the train a short distance, and then start up with a terrible jerk as he took up the slack of the train; my car was next to the caboose and received the full force of the jerk, and threw several of my cows down and the horses on top of them; the jar broke the halters that held horses; I saw they were being killed by the repeated jerks, and I climbed in the trough (I was afraid to get in where they were in any other way) and held on to the side of the car;
18 while in that position they uncoupled the train and took a part of it up the grade, leaving my car stationary for a time; I then managed to get the stock all up, and was still holding on to the side of the car and up in the feed-trough, when the engine came back against the train, without my knowing that it was coming, with such force as to throw me out of the trough, but I held on to the side of the car, knowing that if I got under my stock I would be killed; the car jerked my arm out of place in the shoulder-joint; soon afterwards I called the conductor and he came to my assistance and helped me to get out of the position I was in, and I found my arm was pulled out of the socket at the shoulder; when we got up into Longview the conductor and brakeman, before helping me out of the car, pulled on my arm with all their might, trying to pull it back into place, and they could not; they then helped me out of

the car and took me to a doctor's office; the doctor was out; the doctor who had been sent for came and he tried to get the arm back into the socket, and called in help; they all failed to get it back, and they helped me back into the car and put me onto my cot and fixed it so I would not fall out; the doctor gave me three large doses of morphine; I took one dose then, and according to his instruction, took the second in about two hours; I did not take the third; I then went to sleep and did not wake up again for about six hours, and remained on the cot until I got to Houston; we got to Houston about 11 o'clock Saturday night, and they did not tell me, but sidetracked the car, and I remained there until Sunday morning unable to get out of the car alone. The engine came back against the car with great force, and then plunged forward, taking up the slack, and jerked the car I was in with such force as to hurt me as already stated; I was up in the feed-trough and was just going to get down when the jerk came, and was entirely unexpected to me; the jolt was worst I had experienced, and many others after leaving Texarkana were severe enough to throw the stock off their feet and keep me busy in getting them up. The stock had been thrown down by previous jerks in trying to get up the grade, and
19 I had just gotten them on their feet again when I was hurt; the halters of the horses were broken and the horses were thrown on the cattle, and unless they were all gotten up and in place they would be killed or greatly injured; I was holding on to some iron on the side of the car, and the great jerk pulled my right arm out of socket. The car stopped again a short distance from where I got hurt and I called the conductor; he came and I told him what had happened, and he took my name and age and where I was from and where I was going; he then said that maybe he and the brakeman could pull the arm back in place; they tried and failed; the train pulled up again and the conductor said to me, "If you can walk I will help you to see a doctor about two hundred yards off." I told him I thought that I could walk it if they would help me down to the ground. When we got to the doctor's office he had gone to supper, and the conductor went after him and brought him; the conductor told me they were to stop in Longview about one hour; after getting through with his efforts to put my shoulder in place the doctor gave me the morphine, as before stated; I was put back in my car, where I remained alone and without light, as I could not light my lantern until I got to Houston, between 10 and 11 o'clock Saturday night; during Friday I several times spoke to brakemen and asked to tell the engineer to be careful and not jerk. About daylight, Sunday morning, an old man came along and I got him to help me out of the car; the old man was a stranger, and not in the service of the railroad; I then hunted the yardmaster and asked him to put my car to the stock yards, as my stock was in a bad condition, and he said I would have to take my turn, that they were too busy, and it would be about 9 o'clock before they could be unloaded; I then asked him if he could tell me where I could find a telephone, so that I could telephone my son-in-law, Mr. Culp, and I handed him my son-in-law's card, and

he replied: "Go away and quit bothering me, and wait until your turn comes;" I then walked about until I met a colored
20 man, and he showed me a telephone and I telephoned my son(-in law), and he came to me; he sent me to his father's, and he looked after the stock and sent a doctor to me; I don't know who the doctor was; when I arrived in Houston I was badly used up; my shoulder was swollen very much, and I could scarcely walk from the jolting I had received, and was very sore and had to move around very slowly and with considerable pain. I carried my arm in a sling and rubbed my shoulder with liniment, and I had no use of that arm from the time of the hurt until the present time, and cannot get the hand up to my head now, and have been unable to lie on that side at all when in bed, and cannot turn on that side; I have suffered greatly, and still suffer continually, but more at night when lying down than in the daytime now; I am at present not able to do anything; before said injury occurred I was in fine health; I never had been sick in my life to amount to anything, and was capable of doing almost any kind of work, or I would not have been traveling in charge of a car of cattle that distance; the shoulder is not like it was before the accident, and I think it is still out of place and has become permanently disabled; I think it will continue to be useless to me, and painful; I don't think it can now be remedied; it is drooped, and on the inside I think I can feel the end of the arm bone.

In answer to cross-interrogatories said witness testified:

I did not examine the ticket at all, but I think it was part of my bill of lading; I procured it at Scottsville, Kansas; I gave it to my son-in-law, Mr. Culp, when I got to Houston, and I don't know what he did with it, nor where it now is. I did not call for any doctor; the conductor offered to get one, and did, as I stated in my direct answers; I don't know who he was; he tried to pull my arm in place, failed, and then gave me three large doses of morphine to take as directed. I cannot say how long I staid in Longview; I left with my car, as I was in my car and had nowhere else to go.
21 I think it was three times during the day of October 25th that I spoke to brakemen and complained of the rough handling of the train, and asked that the engineer be requested to be more careful; I cannot say on what part of the road I made that request, but it was intervals during that day.

Dr. T. H. STALLCUP, a witness for the plaintiff, testified as follows:

I am practicing medicine, and have been so engaged about 20 years; I met the plaintiff, Mr. Reeder; I have examined him, and I find his arm dislocated and the shoulder-joint with an atrophy of the muscle, the muscles have all perished away, with some paralysis, partial paralysis; that arm in that condition is not of much service to him; he has no strength in it; I would consider it a permanent injury; I don't know how long it has been done, but after a certain length of time elapses those injuries become permanent; the dislocation has never been put back in joint, or in the socket; I think his appearance as to physical strength and health, inde-

pendent of that arm, is good for a man of his age, and is rather extra; I think the time given by authorities on surgery in which injuries of this kind may be reduced, is from thirty to ninety days; in some cases like this, the nerve feed- the muscles, and when that nerve is severed or cut, when the dislocation is reduced, it does not regain its natural strength, on account of the nerve being separated; the paralysis is not overcome by putting the arm back into position after a certain lapse of time; I have heard how the plaintiff says he got hurt; and I think that sort of accident would be likely to produce the injury that I find him suffering from.

On cross-examination said witness testified:

Under certain circumstances it would occasion much trouble to put that arm back in its proper place directly after the accident; some of them can be put back very readily, and some of them can-
22 not; this one ought to have been put back right away as soon as possible, the sooner the better; sometimes the dislocation of an arm is such that it cannot be replaced, but I think they could be under certain circumstances; all of them could be replaced, but some of them are not willing to undergo the torture, and some people object to being put under the influence of chloroform, and he might have been one of that class of patients; there are certain conditions where, if those ligaments were ruptured, and even if it was reduced, it would not overcome the trouble; it might be replaced in the socket and still have the severing of the muscles, even where the man would have the use of the arm below the elbow; I mean, when the shoulder gets stiff, there would have to be a certain amount of injury to the muscles and ligaments for the shoulder to get stiff; they are very rare, in my practice, because I don't have much to do with railroad injuries; I could not say that in case of a man, such as this one, holding to a pin in the car, that a sudden jerk or jar would cause his hand to give away before it would jerk his shoulder out of joint, because some men are very stout; I could not say what the general rule would be about that; I don't think that it is more probable that the hand would give away before it jerked the arm out of joint; I can very easily see how a sudden jar in a certain direction would cause dislocation of the shoulder-joint; it seems to me that if a man 70 years old would submit to take chloroform, that his arm could be replaced, and if it was replaced at that age, it would not be of such service to him as if he were younger, and the injury to the joint and the rupture of the ligaments would not unite so readily, and from the separation of the nerve- that support the muscles there, there might be some paralysis. I made this examination of the plaintiff one day last week in my office, with a view of testifying in this case; I don't think the plaintiff has any use of that arm now; he cannot raise it up, and he has no grip in his hand, the same dislocation exists now; the ligaments may have held but are not — proper
23 position; I did not discover any tenderness or soreness there, but I did not examine it as to that, but it is all out of position, and the shoulder drops down; I think that it is healed now, and that there is no tenderness; the ligaments would never get into

position until the bones was back in its proper place; the ligaments bears a certain relation to the bone, and the bone being out of position, the ligaments are out of position.

On redirect examination said witness testified:

These dislocations can be more easily reduced at first than at any other time; there are cases in which they may be reduced, but do not benefit the patient; I have seen disabled shoulders where there was never any dislocation; when the deltoid muscles are perished away, that is an evidence that the nerves are cut off, and the effect of that is that the arm is paralyzed.

Dr. GEORGE A. MCDOWELL, witness for plaintiff, testified (by deposition, taken March 7, 1895), as follows:

I reside in Houston, Harris county, Texas; am a practicing physician and surgeon, 35 years actively engaged in practice; am in practice at the present time; have been 28 years in practice in Houston. I examined Alexander Reeder especially with respect to his right arm and shoulder and found there was loss of soundness of said shoulder, change in direction of axis of the humerus, or arm bone; also loss of voluntary motion of arm, and a resistance to movement in certain directions, and a marked prominence of aeromian process, also flattening of deltoid muscle, also arm directed away from side of body, with pain from pressure of bone on the brachial plexus of nerve, particularly the circumflex, which may be so injured that the deltoid muscle can never regain its functions. The arm cannot be lifted up nor brought down to the side to its normal position in its present condition, and is so impaired that it is a stiff and comparatively useless member, being a dislocated
24 shoulder. A fall upon the shoulder, elbow or hand, violent muscular action, may so wrench the arm and muscle as to cause dislocation of the shoulder. The limit of time for reduction of a dislocated shoulder of this variety was fixed by Cooper, first at three months, and the operation after the length of time was considered grave, there being danger of rupture of blood-vessels or of inflammation; therefore, it is not considered wise or prudent to attempt the reduction of such cases after three months, unless the dislocation is a source of constant misery or is really likely to be useful after reduction, neither of which obtains in this case, and therefore the injury is, from a surgical standpoint, permanent.

In answer to cross-interrogatories said witness testified:

I first saw Alexander Reeder, on or about the 28th day of February, 1895, about four months after the occurrence of accident; I simply examined his shoulder. It is true that the sooner a dislocation is treated after the injury, the better it is for the injured party.

ALEXANDER REEDER, plaintiff, a witness on his own behalf, testified as follows:

I am the plaintiff in this suit, and live in Beloit, Mitchell county, Kansas; at the time I was injured, and before, I did not do a great deal of anything, but farmed a little and raised a few horses, etc.,

to make a living; I used to be a blacksmith; in travelling from Texarkana to Longview I was injured in my right arm; I was in the stock car at Texarkana; I had in that car five head of cows, two mules and three head of horses, and some household goods. The brakeman on the train saw me in that car several times; it is about four hundred or five hundred miles from where I started in Kansas to Texarkana; no injury resulted to me or the cattle before I reached Texarkana, and myself and cattle were all right when we got to Texarkana; the train was handled pretty rough all
25 the way from Texarkana to Longview; it jerked back and forth and knocked my cattle and horses down, and the road seemed to be very rough; I spoke to the brakeman about it, and told him I would like, if he could, not to jerk so hard, as they were killing the stock; the reason I rode in the car was that I had to take care of the stock and feed the cattle and horses, and take care of the household goods, and one or two of the cows I had to milk every morning; I was injured near Longview but I don't know how close it was to town. I told the conductor and brakemen about the injury at the time, and how it happened; I believe I put in a claim to the railroad company for this injury; I was down at Houston at that time; the bill of lading that I had went along with the claim, and my pass; the pass was on the bill of lading, if I remember right; I gave that pass to my son-in-law in Houston; I believe I sent in my claim to this company when I sent it in. I did not have a claim against any other company; I have not seen that pass or bill of lading since that time; I got my son-in-law to write, as I could not write myself, and he put it in the letter and sent it to them; just before I was injured, the jar had knocked three cows down, and two of the horses fell on top of them, and when the car stopped I got down in front to get them up again, and after I got them up I was going back to take the seat again, and when I got about a foot from the end a jar came and knocked me off my feet, and I grabbed hold of some iron, and that swung me back this way until they got started all right, and after they got started on the run, and then I got down and got on my seat again; as soon as they stopped again I called to the conductor and brakeman; my horses were tied in the car; the jar broke two of them loose, and two of the cows loose; at the time I was injured I was in the trough, and did not get down among the cattle and horses. It is pretty hard to tell how much money I have been earning a year, as I never kept much account of it, but I suppose that I made two hundred or two hundred and fifty dollars
26 a year—enough to keep me; I cannot do any work now; I still suffer pain from that injury, but more so at night; but for about four months after the injury I could not lie on that side; I do not know the physician they carried me to at Longview; the physician there did not make any effort to put my arm in place; he stripped me off and examined me, and tied my arm in place; that was the physician at Houston; the physician at Longview stripped me off and laid me on the bed and caught hold of my arm and pulled it and twisted it; he did not have anybody to help him the first time, and I told him to get somebody to help him, and a young

man there helped him, and I don't know how long they worked, but they gave it up, and I told him I would like to get it fixed, and then he got at it again; he gave me a big dose of something, and waited a little while to see if that took effect on me, and I did not feel it, and then he got this young man again, and they could not fix it, and he says, "Your arm is badly torn off." That is the expression he used. The company sent a physician to me after I got to Houston. He came in and stripped me and tried to straighten it, and he said it would be all right if I carried it in a sling awhile; I carried it that way for about four months, but it did not help me; my health has been very good all my life.

On cross-examination said witness testified:

I had a cot tied up to the rafters of the stock car, one of these spring wire cots, with a mattress on it; I had a good seat in the corner of the car, and I sat on it when I wanted to; I was up in the trough when I got hurt; the trough was right alongside of the car, where I fed the horses and cattle; the trough was just across the car from the cot; the cot was swinging in the car fastened up with wires; the trough was about two or three feet from the cot; I think the trough was about three feet from the bottom of the car, but I don't know exactly; when I got hurt, I suppose my right side was next to the car; I grabbed the iron with my right hand, and had
27 a stick in my left to punch the stock up with; I think it was between five and six o'clock when I got hurt, as they were just beginning to light up; I don't know how far it was from Longview; I think the doctor at Longview worked on me fully a half or three-quarters of an hour; he gave me three doses of morphine, but I don't know how much there was in a dose; I only took one of them, and then he said after I got in the car if my shoulders still hurt me I had better take another one, and I did so in about an hour; I got to Houston some time Saturday night, and did not see the doctor till Sunday morning about eight or nine o'clock; I think it was the 25th when I got to Houston; I got into Houston Saturday night some time, but they left me standing on the track till Sunday morning; that was the International and Great Northern railroad; I don't think the doctor in Houston was with me over twenty minutes; he did not try to put my arm back in its place; he said there was too much swelling, and he could not do anything then, and he said he thought it was in place all right; I did not think that he knew what he was talking about; I can raise my arm from the elbow down, but I cannot raise it any further than that; I cannot raise my arm straight out, but only as far as the elbow will go; sometimes my fingers on that hand get stiff, and I have to push them back. I am 71 years old; I was raised in Pennsylvania, and have been in Kansas since 1872. The doctor in Houston said he would come back, but he did not come; I had no other physician there; the reason that I did not send for another doctor is because I thought that maybe, by tying it up as he said, it would get better.

On recross-examination said witness testified:

My bill of lading was sent off to a man that I believe they call the claim agent of the Texas and Pacific railroad.

On recross-examination said witness testified:

28 I saw the bill of lading mailed; we did not send it right away, but it was a week or two before we sent it; we sent it to the Texas and Pacific railroad, and not to the I. & G. N.; that is what they told me; I did not know the names of the railroads, but that is what they told me; the claim is for the injury to myself and not to the cattle.

Plaintiff rested.

C. W. GOSSETT, a witness for the defendant, testified as follows: I am a conductor on the Texas and Pacific railroad and held that position on the 25th and 26th of October, 1894; I recollect seeing plaintiff before now; I saw him on the 25th and 26th of October, 1894; at that time he was with an emigrant outfit on my train from Texarkana to Longview Junction; at Texarkana I looked at his pass, and I did not see him any more until we got to Queen City tank; we stopped there, and I asked him to come back to the caboose; that it would be a nicer place for him to ride, and in case of accident it would be safer, and he said that it was inconvenient for him to get in and out of the car to attend to his stock, and he would rather ride in the car with his stock; it is customary on the Texas and Pacific railroad for stockmen to ride in the caboose, but sometimes when they have an outfit like this they do ride in their cars; I told him it would be safer for him to ride in the caboose; his car was the second car from the caboose; it was put there to make it convenient for him to ride in the caboose and attend to his stock, and that is where it is customary to put such cars; the caboose is a safer place to ride than in a stock car; if the plaintiff had been in the caboose that day he would not have been hurt; I saw him at Longview Junction on our arrival there; I saw him on top of the hill just as we were going down in there from the top of the car; there was no way for us to get into the car while the train was in motion; I got the word that he was hurt, and went and looked over the top of the car; the

29 first thing I did I got the regular form that we have to fill out and asked him the regular questions in regard to his age, and where he lived, and how the accident occurred; he made a verbal statement to me how the accident occurred, and I wrote it down; I cannot say that I reduced the statement to writing exactly as he made it to me; I sent the statement to the company; as near as I could recollect, his statement was that while trying to get a cow up, or one of his stock that was down while the train was in motion, that he fell, and his shoulder was misplaced or knocked out of joint; his cot was in one end of the car on top of his household goods, and, I think, it was stru-g up to the roof of the car; we got into Longview at 7.45 p. m.; I took the plaintiff to the drug store in Longview where the doctor's office is, and he was not there, and I sent for the doctor, and left him in care of the druggist; the brakeman and I tried to replace his arm while he was in the car, after our arrival at Longview Junction; he wanted us to do it; we were about a half mile from Longview Junction when the brakeman

notified me that there was something the matter with him. By the slack of the train is meant that when the train is going downhill, and the head end starts up, and the slack bunches it together; the slack is not a regular space, but varies from five to eight or nine inches between each car; in going downhill the cars run up together, and when it starts up they pull out again; we had twenty or twenty-one cars in that train, with the caboose.

On cross-examination said witness testified:

Dr. Stansbury was the doctor that I carried him to at Longview; I don't think he was the local surgeon of the company; we went to him because he was the nearest physician. We did not have to double any that day between Longview and Marshall; I remember that, because we never have a double between Marshall and Longview going west: I could not recollect whether we did any
30 siding that day or not between Marshall and Longview, but we did not do any switching.

On redirect examination said witness testified:

There was nothing unusual as to the jerking of the train that day; it was the regular run; we made an average run, and the train was handled carefully, and just the usual jerks and jolts was all that we experienced.

O. P. Cubberly, a witness for the defendant, testified as follows: I reside at Longview, Texas; on or about October 25th and 26th, 1894, I was an engineer on the Texas and Pacific railroad; I remember the time Mr. Reeder was hurt on the train. There was nothing unusual about the run between Texarkana and Longview that day, that I know of; there was no rough handling of the cars; I did not know anything about the accident; there were about twenty cars in the train.

On cross-examination said witness testified:

We did not double that day between Marshall and Longview, but we did double about a mile east of Marshall; by doubling is meant to take half of a train over a hill, and then come back and get the other part; I don't remember everything that occurred that day, but I do remember about the doubling.

On redirect examination said witness testified:

With the train we had that day, the amount of slack I suppose would be from eight to twelve feet on the twenty cars.

J. H. Kelpe, a witness for defendant, testified as follows:

I was a freight brakeman on the Texas and Pacific rail-
31 road about October 26, 1894; I did not see the accident to Mr. Reeder on that day, but I was the first man there after he was hurt, I suppose; he told me he was hurt; I was on top setting brakes at the time, and he was inside of the car; I went and got the conductor and we went and assisted him all we could, and tried to pull his arm in place; when I first saw Mr. Reeder that day, I asked him to come back in the caboose and ride, and he said he would sooner ride in his car with the stock, and I told him there was room in the caboose for him, and I saw him again at Queen

City and he gave me some apples that he had in the car, and then I saw him again at Marshall, where we were taking water, and I asked him how his cattle were, and he said they were in pretty good shape at Marshall, but they were in bad shape getting into Longview; when I saw him at Marshall it was after we had doubled, and he had not been hurt then. We made what we call, a good average run that day from Texarkana to Longview; we had no accident to the cars, and made it in the usual hours; it was an ordinary run, and not any rougher than usual. It has always been customary for a man with an emigrant outfit, to ride in the caboose, and when the train stops, to go out and look after their stock; in such cases the stock car is next to the caboose, unless we have oil tanks; that is the rules of the road; the caboose is a safer place to ride than a stock car, and the plaintiff would not have been hurt if he had been riding in the caboose; he told me he got hurt trying to get his cattle up.

On cross-examination said witness testified:

He told me he got hurt while trying to get his cattle up, and while the train was in motion. We doubled Marshall hill that day, on the east side of Marshall; that is the only place we doubled from Texarkana to Longview; the plaintiff would not have been hurt if he had been in the caboose, unless he got off while the train was in motion; I was in the caboose and did not get hurt; the reason the stock car is placed so near the caboose is for the convenience of
32 the man to look after the stock: he could get in there to get the stock up while the train was in motion, and there is no ladder by the door: he would have to go in the car to get them up. We got to Longview that night about 7.30 or 7.40.

J. M. Buchanan, a witness for defendant, testified as follows:

About October 25, 1894, I was a freight brakeman on the Texas and Pacific railroad; I was on the train on which Mr. Reeder was hurt; that was an ordinary run that day, and there was no trouble anywhere; we doubled Marshal hill, is the only place that I remember; I never saw the plaintiff at all, as I was on the forward end of the train all the while.

On cross-examination said witness testified:

I did not see the plaintiff at all on that trip, and did not see him after he was hurt, at Longview; we doubled Marshall hill most every trip, and we had a heavy train that trip; I never was on a train that doubled a hill between Marshall and Longview; I have been on this part of the road three years; there are some side tracks between Marshall and Longview, but I don't remember whether we switched any between there on that trip; I cannot tell the jury everything that happened on that trip as it was just an ordinary trip.

Alexander Reeder, recalled by defendant, testified as follows:

I signed this contract for shipment.

Defendant offers said contract in evidence, which is as follows, to wit:

33 Duplicate.

The Missouri Pacific Railway Company; St. Louis, Iron Mountain & Southern Railway Company, and leased, operated, and independent lines.

Live-stock Contract.

Limiting the liability of carriers.

No. of car, 334; initial, H. C. A. & N.; No. of heads, 10; waybills series 1, No. 1.

Emigrant.

Live-stock contract, executed at Scottsville, Ks., station, 10, 22, 1894.

This agreement, made between the Missouri Pacific Railway Company, of the first part, and C. S. Culp of the second part, witnesseth, that for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described below, and the parties in charge thereof, as hereinafter provided, viz:

One car, said to contain ten head—5 cows, 3 horses, 2 mules, from Scottsville, Kansas station, to Houston, Texas station, consigned to C. W. Culp; 92 dollars for 2,000 pounds, at the rate of tariff per hundred pounds (released to $100.00 per head on horses, $10.00 per head on cows) said rate being less than the rate charged for shipments transported at carriers' risk, for which reduced rates and other considerations it is mutually agreed between the parties hereto as follows:

First. That the live stock covered by this contract is not
34 to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market.

Second. That the first party is exempted from liability for loss or damage arising from derailments, collision, fire, escapement from cars, heat, suffocation, overloading, crowding, maiming or other accident or causes not arising from negligence on the first party.

Third. That the second party shall assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock covered by this contract while in cars, yards, pens, or elsewhere, and shall load and unload the same at his own expense and risk.

Fourth. That the first party is exempted from liability for loss or damage caused by any mob, strike or threatened or actual violence to person or property from any source.

Fifth. That, as a condition precedent to any damages, or any loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or to the nearest station agent of the first party, or to the agent at destination or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the

delivery of the stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.

Sixth. That in case of total loss of any of the live stock covered by this contract, from any cause for which the first party will be liable payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed $100 00 for each horse, pony, gelding, mare or stallion, mule or jack; $50.00 for each ox, bull or steer; $30.00 for each cow; $10
35 for each calf or hog; $3.00 for each sheep or goat, and in case of injury or partial loss, the amount of damages claimed shall not exceed the same proportion.

Seventh. That this contract does not entitle the holder thereof, or any other person, to ride on any train except for the purposes and in accordance with the conditions printed on the back hereof, all of which are agreed to be a part of this contract; nor to ride in the cars of any train except that in which the live stock covered by this contract is transported, nor to return passage from —— to —— unless this contract is presented with- — days from the date hereof to the properly authorized agent of the first party for return pass.

Eighth. That such pass, properly obtained as above, shall be used within 24 hours after the date and hour issued, by such person or persons only whose names are written herein —— and who actually accompanied the live stock for the purpose of caring therefor, and shall not include women, infants, or other persons unable to perform the services of caring for live stock in transit, as required by this contract; and persons entitled to return passage under the term of this contract shall perform the journey within — days from the date of return pass.

Ninth. That the person or persons in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars from depots or platforms, or to furnish lights for the accommodation or safety of such persons.

Tenth. That the first party hereby releases and waives any
36 and all cause for action for damages that may have accrued to him by any written or verbal contract prior to the execution hereof.

Eleventh. That in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the first party shall be released from liability of every kind after said live stock shall have left its road, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of its road, excepting to protect the through rate of freight named herein.

Twelfth. That no person other than the owner of the stock shipped

or his duly authorized agent, in the name of the owner, shall be allowed to sign this contract.

Thirteenth. That no suit or action against the first party for the recovery of any claim by virtue of this contract shall be sustained in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall occur; and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Fourteenth. That in making this contract, the undersigned owner, or other agent of the owner, of the stock named herein, expressly acknowledges that he has had the option of making this shipment under the tariff rates, either at carrier's risk or upon a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations and conditions herein named.

Fifteenth. That the evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, included the printed rules and regula-
37 tions on the back thereof, and that they all constitute a part hereof, fully assents to each and all of the same, is his signature hereto.

C. W. WILSON,
Agent for Mo. Pac. R'y Co.
C. S. CULP, *Shipper.*

Witness:

——— ———.

The Missouri Pacific R'y Co., St. Louis, Iron Mountain & Southern R'y Co., and leased and operated and independent lines.

SCOTTSVILLE, KAN., 10, 22, 1894.

Live-stock Contract.

We, the undersigned, persons in charge of the live stock mentioned in the within contract, in consideration of the free pass granted to us by the Missouri Pacific Railwry Company, and of the other covenants and agreements contained in said contract, and those printed on the back hereof, all *for* which, for the considerations aforesaid, are hereby accepted by us and made a part of this our contract, and all the terms and conditions of which we hereby agree to observe and to be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employés of said company, for the purposes in said contract stated, and that we do agree to assume, and do hereby assume, all risk incident to such employment, and that said company shall, in no case, be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employés.

A. REEDER.

——— ———.

Cars No. 334, H. C. A. & N.

38 Pass on freight trains only.

A. Reeder.

Parties in charge of accompanying stock.

C. M. WILSON, *Agent.*

NOTE.—Agents will make contract in duplicate, giving one to shipper, and return the other to the freight claim agent, St. Louis, Mo.

Notice.—This pass must be carefully filled out by the agent at destination, to whom the contract will be presented by the party entitled to return transportation.

Drover's Pass.

Issued by the Missouri Pacific Railway Company.

Good for continuous pass only.

Issued to —— ——, who — actually in charge of and accompanied *to* — car of live stock, shipped from —— on the — day of ——, 189–. Is not transferable, and must be presented to train conductor for continuous passage by those entitled to free passage under this contract, within twenty-four hours after the date and hour of issue.

As a means of identification, the agent issuing this pass will require each person to write his name in the spaces below, and will cancel the lines not required by drawing a pen through them.

If this pass is found in the hands of any other person other than the original holder of the stock contract, whose name is written above, it will then become the property of this company, and the conductor will take it up and collect full fare. — hereby agree to all the conditions and provisions of this contract, and —
39 also agree to sign names and otherwise identify ourselves as the original holders whenever called upon by any agent or conductor of this railway company to do so.

Personal signature of the persons whose names are above written as entitled to free passage under this contract.

This pass must be written in ink, otherwise it will not be valid.

Date of issue, —— —, 189–.

Hour of —— m.

Witness: —— ——.

—— ——,

Ag't Mo. Pac. Railway Co.

Special Instructions to Conductors.

You will require all persons presenting these passes to write their names below and compare the writing with that of the signature above, in order to satisfy ourselves that the passes are being used by those parties only who are entitled to free passes under this contract.

—— ——.

—— ——.

—— ——.

W. B. DODRIDGE,
General Manager.

On cross-examination said witness testified:

I do not remember these gentlemen who have just testified, as the men who were in charge of the train the day I got hurt. I never tried to get my cattle up that day while the train was in motion, and I made no such statement to the brakemen or conductor;
40 I did not try to get them up while the train was in motion, because the trough was so narrow that I could hardly get along it, and I would wait till it stopped.

The plaintiff, Alexander Reeder, instituted this suit in the district court of Marion county, Texas, and the cause was duly and legally removed therefrom, to the U. S. circuit court for the eastern district of Texas, at Jefferson, by The Texas and Pacific Railway Company, defendant.

The court then charged the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: This is a suit by the plaintiff, Alexander Reeder, against the Texas and Pacific Railway Company, for damages for personal injuries received by him, on the defendant's railway, alleging that he was riding on a freight train on a drover's pass, and in the car with his cattle and goods, and that he was injured by the rough handling and jerking of the cars, etc., as set out in the petition which has been read to you.

The defendant answered, that the said plaintiff contributed to his own injury, and assumed the risk, by reason of his riding in the stock car with the animals instead of riding in the caboose, which it alleges was the safer place to ride in than the stock car, and that he would not have been hurt if he had rode in the caboose, and that he was requested by the operatives of the defendant company to ride in the caboose, etc., as set forth in the defendant's answer, which has been read to you. My view of this case, gentlemen, is not in accordance with the position assumed by the attorneys, either
41 for plaintiff or the defendant in this case, and I charge you, that there is but one theory of the law of this case, by which the plaintiff can recover, and that is as follows:

If you believe from the evidence, that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was stationary, his cattle being down, and needed his attention, he at the time, in a prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time, by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives; you will find for the plaintiff, and assess actual damages as hereinafter instructed.

If, however, you believe from the evidence, that at the time the plaintiff was hurt, that the train upon which he was riding was in motion, at the time he was giving the horses and cattle the assist-

ance which they needed, the plaintiff would not be entitled to recover, and you will find for the defendant.

If you should find for the plaintiff, in estimating the damages, you will take into consideration the age of the plaintiff, his mental and physical suffering, and consider whether the injury is permanent in its character or only temporary; whether he is disabled for life or only partially; his diminished ability to labor or perform his avocation in life.

You are the judges of the credibility of the witnesses, the weight to be given to their evidence, and the burden of proof is upon the plaintiff, to establish his right to recover by a preponderance of the evidence.

If you find for the plaintiff, the form of your verdict will be:

"We, the jury, find for the plaintiff, Alexander Reeder,
42 against the Texas and Pacific Railway Company, at (blank dollars)," giving the amount, and date it, and sign it, by your foreman.

Bill of Exceptions.

The defendant excepted, to the charge, because it did not submit to the jury, either the assumed risk or the contributory negligence of the plaintiff, in open court before the jury retired.

After all the evidence was introduced, and the argument of counsel was heard, the defendant requested the court to charge the jury as follows:

"Upon the law and the facts in this case, the plaintiff cannot recover, and you are instructed to return a verdict for the defendant."

The court refused to give the peremptory instruction, to which the defendant then and there excepted in open court before the jury retired, and after the court had given its main charge to the jury, the defendant, by attorney, requested each of the three following special charges, Nos. 2, 3 and 4:

No. 2. "If you find from the evidence that the plaintiff would not have been hurt if he had *rode* in the caboose instead of the stock car, you will find for the defendant."

No. 3. "If you find from the evidence that the plaintiff, Alexander Reeder, rode in the stock car with his cattle and goods, and that a caboose was attached to said train, and the conductor or operatives of said train invited the plaintiff to ride in said caboose, and that the caboose was a safer place to ride in than the stock car, you will find for the defendant company."

4. "If you find from the evidence that the caboose was a safer place to ride in than the stock car, and the plaintiff knew it, or could have known it by the use of ordinary diligence, the plaintiff cannot recover, and you will find for the defendant company."

43 The court refused to give each and all of the said three special instructions requested by the defendant, to which refusal, and each of them, the defendant by attorney then and there excepted in open court before the jury retired.

Approved and ordered filed March 13th, 1896, as part of the record in this cause.

D. E. BRYANT, *Judge.*

Endorsed: C. L., No. 435. Alexander Reeder *vs.* The Texas and Pacific Railway Company. Filed March 14th, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

Motion for New Trial.

ALEXANDER REEDER
vs.
TEXAS AND PACIFIC RAILWAY CO. } No. 435.

Now comes the defendant, The Texas and Pacific Railway Company, and moves the court to grant it a new trial herein, for the following reasons, to wit:

1. The court erred in failing to give the peremptory instructions to find for defendant.

2 The court erred in failing to give the four special charges asked by the defendant.

3. The court erred in giving the one ground upon which the plaintiff could recover, to the effect that plaintiff could recover if the train was stopped and standing still when the plaintiff got hurt, and he was hurt while the train was standing still, and while in
44 the act of helping or getting his stock up, which was down in the stock car, because if the plaintiff was in the stock car voluntarily, instead of in the caboose, which was a safer place, and he was so notified and remained on the stock car after he was told the caboose was a safer place and invited to the caboose, he, the plaintiff, could not recover, and he was guilty of contributory negligence, and assumed the risk of his riding on the stock car instead of the caboose.

W. T. ARMISTEAD,
Attorney for Defendant, Texas and Pacific R'y Co.

Endorsed: C. L., No. 435. Alexander Reeder *vs.* The Texas and Pacific Railway Company. Filed February 4th, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

ALEXANDER REEDER
vs.
TEXAS AND PACIFIC RAILWAY CO.

TUESDAY, *February 4th*, 1896.

This day again came the parties to this suit, by attorneys and thereupon came on to be heard defendant's motion for a new trial, and the said motion having been heard, and the court being duly advised as to the law, is of the opinion the law is against the motion, which is hereby overruled, and is so ordered, to which the defendant by its attorney then and there excepted.

ALEXANDER REEDER
vs.
TEXAS AND PACIFIC RAILWAY CO.

TUESDAY, *February 4th*, 1896.

On this day, on application of the defendant, the court allowed the defendant forty days from this date to prepare and present the bill of exceptions in this cause, and this order is accordingly entered, and a bond in the meantime is waived by the plaintiff in open court and execution stayed.

45 *Petition for Writ of Error and Supersedeas.*

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

ALEXANDER REEDER
vs.
TEXAS AND PACIFIC RAILWAY CO. } 435.

To the honorable judges of the circuit court of the United States for the eastern district of Texas, at Jefferson:

Your petitioner, The Texas and Pacific Railway Company, respectfully shows to the court that Alexander Reeder recovered a judgment against the Texas and Pacific Railway Company for damages for personal injuries, in the circuit court of the United States for the eastern district of Texas, at Jefferson, Texas, on February 4th, 1896, for the sum of $1,500.00, and all costs of suit, because it shows that in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said circuit court, in this cause, a manifest error has happened, to the great damage of your petitioner, as by its complaint appears, and that forty days was allowed after the adjournment of court to perfect the bill of exceptions, and that your petitioner presents herewith said bill of exceptions and assignment of errors, and prays that your honor grant a writ of error and supersedeas on said judgment, and fix the amount of the supersedeas bond.

Respectfully submitted.

W. T. ARMISTEAD,
Attorney for the Texas and Pacific Railway Co.

The writ of error applied for above is allowed, and the same to act as a supersedeas upon the judgment, upon the approval of bond in the sum of $3,000.00.

D. E. BRYANT, *Judge.*

March 13, 1896.

46 Endorsed: C. L., 435. Alexander Reeder *vs.* The Texas and Pacific Railway Company. Filed March 14th, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

Assignments of Error.

In the Circuit Court of the U. S. for the Eastern District of Texas, at Jefferson.

ALEXANDER REEDER
vs.
TEXAS & PACIFIC R'Y CO. } No. 435.

Now comes the defendant, The Texas and Pacific Railway Company, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, and it respectfully assigns the following errors, to wit:

1. The court erred in allowing the deposition of the plaintiff, Alexander Reeder, to be read in evidence over the objection of the defendant; because the plaintiff was present in court at the time, and afterwards testified in person.

2. The court erred in refusing to charge the jury as requested by the defendant, as follows: "Upon the law and the facts in this case, the plaintiff cannot recover, and you are instructed to return a verdict for the defendant;" because the plaintiff assumed the risk, and by riding in the stock car instead of the caboose, which he was invited to ride in, and which was prepared for his transportation, and in which he would not have been hurt, was guilty of contributory negligence, and upon all the evidence he was not entitled to recover.

3. The court erred in its main charge to the jury, as follows: "If you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that
47 while the train was stationary, his cattle being down and needed his attention, he at that time, in a prudent and careful manner attempted, or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the car in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for plaintiff;" because it was not qualified by the doctrine of assumed risk and contributory negligence of the plaintiff, in riding in the stock car instead of the caboose, which was a safer position and where he would not have been hurt.

4. The court erred in refusing to give special charge No. 2, requested by the defendant, as follows: "If you find from the evidence that the plaintiff would not have been hurt, if he had *rode* in the caboose instead of the stock car, you will find for the defendant;" because the caboose was the proper car for the plaintiff to ride in, and where he was invited to ride by the operatives of the defendant, and where his drover's pass required him to ride, and where he would not have been hurt if he had done so.

5. The court erred in refusing to give the third special charge re-

quested by the defendant, as follows: "If you find from the evidence that the plaintiff, Alexander Reeder, rode in the stock car with his cattle and goods, and that a caboose was attached to said train, and the conductor, or operatives of said train, invited the plaintiff to ride in said caboose, and that the caboose was a safer place to ride in than the stock car, you will find for the defendant company;" because if the plaintiff voluntarily, or for his own convenience, rode in the stock car, when a caboose was provided for him, he thereby attributed to his own injury and assumed all risk, in taking the more dangerous position in the stock car, which was proved by the uncontroverted evidence in the case.

48 6. The court erred in refusing to give the fourth special charge as requested by the defendant, as follows: "If you find from the evidence that the caboose was a safer place to ride in than the stock car, and the plaintiff knew it, or could have known it, by the use of ordinary diligence, the plaintiff cannot recover, and you will find for defendant company;" because it was established by the undisputed evidence that the caboose was a safer place, and the plaintiff was requested by the operatives to ride in the caboose, and he was guilty of contributory negligence by riding in the stock car.

Wherefore the defendant company prays the court that these assignments of error be sustained, and that the judgment be reversed and the cause remanded.

W. T. ARMISTEAD,
Attorney for the Texas and Pacific Railway Co.

Endorsed: C. L., No. 435. Alexander Reeder *vs.* The Texas and Pacific Railway Company. Filed March 14th, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, at Jefferson, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Alexander Reeder as plaintiff and The Texas & Pacific Railway Company as defendant, wherein judgment was rendered in favor of plaintiff and against the defendant

49 for $1,500.00 (fifteen hundred dollars) on the 4th day of February, 1896, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same

at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the records and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

C. DART,
Clerk of the Circuit Court, Eastern District of Texas.
W. E. SINGLETON, *Deputy.*

Allowed by—
D. E. BRYANT, *Judge.*

March 13th, 1896.

No. 435. United States circuit court, eastern district of Texas, at Jefferson. Alexander Reeder *vs.* The Texas & Pacific Railway Company. Writ of error. Filed March 14th, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

I, C. Dart, clerk, do hereby certify that a true and correct copy of the within writ of error has been made and filed with the record of the case in this office.

50 Given under my hand and seal of this circuit court of the United States for said eastern district of Texas at Jefferson, this the 20th day of March, 1896.

C. DART, *Clerk,*
By W E. SINGLETON, *Deputy.*

Bond on Writ of Error.

Know all men by these presents that we, The Texas & Pacific Railway Company, a U. S. corporation, as principal, and —— ——, as sureties, are held and firmly bound unto Alexander Reeder, in the full and just sum of $3,000.00 (three thousand dollars), to be paid to the said Alexander Reeder, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 10th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the circuit court of the United States, in and for the eastern district of Texas, at Jefferson, in a suit pending in said court between Alexander Reeder plaintiff, and The Texas & Pacific Railway Company, defendant, cause No. 435, on the docket of said court a judgment was rendered against the said The Texas & Pacific Railway Company, in favor of plaintiff, for the sum of $1,500.00 (fifteen hundred dollars), and all costs of said suit, and the said The Texas & Pacific Railway Company, having obtained a writ of error, and filed a copy thereof in the clerk's office of the

said court to reverse the judgement in the aforesaid suit, and a citation directed to the said Alexander Reeder, citing and admonishing him, to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof: Now, the condi-
51 tion of the above obligation is such that if the said The Texas & Pacific Railway Company prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. Sealed and delivered in the presence of:

THE TEXAS & PACIFIC RAILWAY COMPANY, [SEAL.]
By W. T. ARMISTEAD, *Its Attorney.*
J. D. CRAWFORD. [SEAL.]
JNO. A. FEIDLER. [SEAL.]
S. A. SPELLINGS.

Approved by—
D. E. BRYANT, *Judge.*

March 13th, 1896.

Endorsed: C. L, No. 435. United States circuit court, eastern district of Texas, at Jefferson. Alexander Reeder *vs.* The Texas & Pacific Railway Company. Filed this the 14th day of March, A. D. 1896. C. Dart, clerk, by W. E. Singleton, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alexander Reeder, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Jefferson, wherein The Texas & Pacific Railway Company is plaintiff in error
52 and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

D. E. BRYANT, *Judge.*

Attest: C. DART, *Clerk,*
By W. A. SINGLETON, *Deputy.*

I, C. Dart, clerk of the circuit court of the United States, for the eastern district of Texas, do hereby certify that a true and correct copy of the within citation has been made and filed with the papers in the case, and is of record in this office.

Given under my hand and seal of the circuit court for the eastern district of Texas, at Jefferson, this 20th day of March, 1896.

C. DART, *Clerk*,
By W. E. SINGLETON, *Deputy*.

No. 435. — docket. United States circuit court, eastern district of Texas, at Jefferson. Alexander Reeder *vs.* The Texas & Pacific Railway Company. Citation in error. Issued March 14, 1896. C. Dart, clerk, by W. E. Singleton, deputy.

Service of the within citation is hereby waived this March 19th, 1896.

L. S. SCHLUTER,
Attorney for Defendant in Error.

53 ALEXANDER REEDER *vs.* TEXAS AND PACIFIC RAILWAY COMPANY. } C. L., No. 435.

1895.			
Aug. 16.	To fil. and enter- cert. transcript	$0	40
	" " Agreement		10
	" " Answer		10
	" " Depositions		10
Sept. 23.	" Continuance by defendant		30
Dec. 14.	" Filing interrogatories		10
	" Making orig. copy int. & X int.		70
	" Making int'y and cross-int'y		60
	" Issuing two commissions	2	60
1896.			
Jan. 28.	" Set for trial		15
	" Fil. first amended answer		10
	" Fil. first supplemental petition		10
Feb. 4.	" 4 special charge def't		40
	" Swearing witnesses		10
	" Swearing jury		10
	" Swearing judgment		10
	" Recording judgment		45
	" Fil. motion for new trial		10
	" Motion for new trial overruled		30
	" Fil. application 40 days		10
	" Enter order allowing 40 days		30
March 14.	" Fil. bill of exceptions		10
	" Fil. petition for writ of error and supersedeas		10
	" Bond for writ of error		10
	" Citation in error		10
	" Fil. assignment of error		10
	" Fil. copy of writ of error		10
	" Making copy of writ of error	1	00
	" Making copy citation in error	1	00
	" Issuing original writ of error	1	30

	To Issuing original citation in error.....	1 30
	" Approving bond in error.....	1 70
	" Recording bond in error.....	1 00
	" Docket and indexes.....	1 00
	" Making cost bill and fil. duplicate.....	1 00
March 23.	" Making transcript, 53 pages	22 50
		$39 50

54 C. L., No. 435.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margin of said pages (from one (1) to fifty-five (55) both inclusive), contain a full, true and correct copy and transcript of the original caption, original petition, petition for removal, bond for removal, order of removal, first amended answer of defendant, first supplemental petition, judgment, bill of exceptions, motion for new trial, order overruling motion, petition for writ of error, assignment of error, writ of error, writ of error bond, citation in error, cost bill, in cause C. L. No. 435, Alexander Reeder *vs.* The Texas & Pacific Railway Company, all of which appears from the records of said court, now in office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court of the United States of America for the eastern district of Texas, at Jefferson, at my office in said city of Jefferson, this 21st day of March, A. D. 1896.

C. DART, *Clerk*,
By W. A. SINGLETON, *Deputy*.

55 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

TUESDAY, *June* 9, 1896.

(*Extract from Minutes.*)

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
ALEXANDER REEDER, Defendant in Error.

This cause was regularly called this day and submitted to the court upon briefs of counsel heretofore filed.

56 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

MONDAY, *June* 15, 1896.

(*Extract from Minutes.*)

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
ALEXANDER REEDER, Defendant in Error.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Texas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed at the cost of plaintiff in error

57 *Petition for Writ of Error.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ALEXANDER REEDER, Defendant in Error. } No. —.

To the Honorable Melville W. Fuller, Chief Justice, or to any associate justice of the Supreme Court of the United States:

Now comes the Texas and Pacific Railway Company, by its attorney, and complains that in the record and proceedings, and also in the rendition of the judgment of the United States circuit court of appeals for the fifth circuit, sitting at New Orleans, in the above styled and numbered cause, on the 15 day of June, 1896, affirming the judgment of the United States circuit court for the eastern district of Texas in said cause, manifest error hath intervened, to the great damage of the said The Texas and Pacific

58 Railway Company; that the jurisdiction of the circuit court for the eastern district of Texas in this cause depended upon the fact that The Texas and Pacific Railway Company, defendant therein, was a corporation created by an act of Congress; that the amount involved herein and the matter in controversy exceeds the sum of one thousand dollars, besides costs, and this is not a case in which the jurisdiction of the circuit court of appeals is made final.

Wherefore it prays for allowance of writ of error, to the end that this cause and said judgment may be carried to the Supreme Court of the United States, and it prays for supersedeas of said judgment and such other process as may cause the same to be corrected by the said Supreme Court.

(Signed) T. J. FREEMAN,
Attorney for the Texas & Pacific Railway Co.

Writ of error and supersedeas allowed and bond fixed at the sum of $3,000 this the 1st day of July, 1896.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed June 25, 1896. J. M. McKee, clerk.

59 *Assignment of Errors.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ALEXANDER REEDER, Defendant in Error. } No. —.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas
60 and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Upon the law and the facts in this case the plaintiff cannot recover, and you are instructed to return a verdict for the defendant," because the plaintiff assumed the risk and by riding in the stock car instead of the caboose, which he was invited to ride in and which was prepared for his transportation and in which he would not have been hurt, was guilty of contributory negligence, and upon all the evidence he was not entitled to recover.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in that portion of its main charge which is as follows:

"If you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was stationary, his cattle being down and
61 needed his attention, he at that time, in a prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt

or bumping of the car in which he was riding through and by the negligence of the defendant company or its operatives, you will find for plaintiff," because it was not qualified by the doctrine of assumed risk and contributory negligence of the plaintiff in riding in the stock car instead of the caboose, which was a safer position and where he would not have been hurt.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"If you find from the evidence that the plaintiff would not have been hurt if he had *rode* in the caboose instead of the stock car, you will find for the defendant," because the caboose was the proper car for the plaintiff to ride in, and where he was invited to ride by the operatives of the defendant, and where his drover's pass required him to ride, and where he would not have been hurt if he had done so.

62

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"If you find from the evidence that the plaintiff, Alexander Reeder, rode in the stock car with his cattle and goods, and that a caboose was attached to said train and the conductor or operatives of said train invited the plaintiff to ride in said caboose, and that the caboose was a safer place to ride in than the stock car, you will find for the defendant company," because, if the plaintiff voluntarily or for his own convenience rode in the stock car when a caboose was provided for him, he thereby contributed to his own injury and assumed all risk in taking the more dangerous position in the stock car, which was proved by the uncontroverted evidence in the case.

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

63 "If you find from the evidence that the caboose was a safer place to ride in than the stock car and the plaintiff knew it or could have known it by the use of ordinary diligence, the plaintiff cannot recover, and you will find for defendant company," because it was established by the undisputed evidence that the caboose was a safer place, and the plaintiff was requested by the operatives to ride in the caboose, and he was guilty of contributory negligence by riding in the stock car.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed; and it will ever pray.

(Signed) T. J. FREEMAN,
Attorney for The Texas & Pacific R'y Co., Plaintiff in Error.

Endorsed: June 25, 1896. J. M. McKee, clerk.

64 *Writ of Error Bond.*

Know all men by these presents that we, The Texas and Pacific Railway Company, a corporation duly incorporated, as principal, and George J. Gould, of Lakewood, New Jersey, as surety, are held and firmly bound unto Alexander Reeder in the full and just sum of three thousand dollars ($3,000), to be paid to the said Alexander Reeder, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a regular term of the United States circuit court in and for the eastern district of Texas, sitting at Jefferson, at the January term, 1896, in a suit pending in said court between Alexander Reeder, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said The Texas and Pacific Railway Company for the sum of one thousand five hundred dollars ($1,500), besides costs of suit; and

65 Whereas from said judgment the said The Texas and Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which court on the 15th day of June, 1896, rendered a judgment affirming said judgment in all particulars; and

Whereas the said The Texas and Pacific Railway Company has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to the said Alexander Reeder, citing and admonishing him to be and appear at said Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific R'y Co. shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE TEXAS AND PACIFIC RAILWAY COMPANY,
[SEAL.] By GEO. J. GOULD, *President.*
(Signed) GEO. J. GOULD. [SEAL.]

66 Attest: (Signed) C. E. SATTERLEE, *Sec'y.*

Witness:
(Signed) D. D. DUNCAN.

The foregoing bond is approved, to operate as a supersedeas.
July 1st, 1896.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed July 3, 1896. J. M. McKee, clerk.

67 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Alexander Reeder, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should
68 be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the United States, the first day of July, in the year of our Lord one thousand eight hundred and ninety-six.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed July 3, 1896. J. M. McKee, clerk.

69 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 68 pages, numbered from 2 to 69, inclusive, contain a true copy of the records, pleas, process, proceedings, and all papers in the case of The Texas & Pacific Railway Company, plaintiff in error, *v.* Alexander Reeder,

defendant in error, No. 484, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 21 day of July, A. D. 1896.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

70 UNITED STATES OF AMERICA, *ss:*

To Alexander Reeder or his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 1st day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN.
Associate Justice of the Supreme Court of the United States.

71 [Endorsed:] 16,347. Reeder. Copy of this citation waived, and we hereby accept service of the same this the 8th day July, 1896. Ewing & Ring, att'ys for Alexander Reeder. Filed July 11, 1896. J. M. McKee, cl'k.

Endorsed on cover: Case No. 16,347. U. S. circuit court of appeals, 5th circuit. Term No., 208. The Texas & Pacific Railway Company, plaintiff in error, *vs.* Alexander Reeder. Filed July 29, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
ALEXANDER REEDER.

No. 208.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Plaintiff, Alexander Reeder, a resident citizen of the State of Kansas, brought this action against The Texas and Pacific Railway Company, a corporation under the laws of the United States, in the District Court of Marion County, Texas.

It was removed to the Circuit Court of the United States for the Eastern District of Texas, defendant being a Federal corporation.

Plaintiff alleged that on October 22, 1894, he was transporting certain horses and cows from Scottsville, Kansas, to Houston, Texas, and that while on the line

of the defendant company between Texarkana and Longview, Texas, he being in the same car with his horses and cows, defendant's servants negligently and recklessly and against his protest jolted and jerked the train, causing his stock to fall down and that while he was engaged in getting them on their feet, he was injured by a jolt or jar of the train "caused by the engineer in charge of said train starting or stopping or moving the same or a portion thereof with unnecessary abruptness and violence." He further alleged that he was "riding in said car on a drover's pass with the knowledge, acquiescence and consent of the defendant" (Tr., pp. 2, 3).

Defendant demurred generally, pleaded the general issue, and for special answer alleged the contributory negligence of plaintiff in riding in the stock car instead of the caboose provided for his use and in trying to lift his stock to their feet while the train was in rapid motion. Defendant also alleged that the injury complained of was one of the assumed risks "incident to the nature of his contract and the mode of his transportation and that by the rules of the company the plaintiff with his drover's pass was entitled to, and required to ride in the caboose provided for him; that he was advised and notified of said rules and refused to ride in the caboose of his own choice and over the protest of defendant, that the stock car was more dangerous to be in than the caboose, and that if he had been in the caboose instead of in the stock car he would not have been hurt" (Tr., pp. 7, 8).

Plaintiff demurred to the answer, and put in issue the new matter set up in it.

At the trial, the "Live-Stock contract," under which plaintiff was traveling and transporting his stock, was

put in evidence. It contained a clause as follows (Tr., p. 22):

"NINTH. That the person or persons in charge of live stock covered by this contract *shall remain in the caboose car attached to the train while the same is in motion*, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars from depots or platforms, or to furnish lights for the accommodation or safety of such persons."

Another clause of said contract signed by plaintiff recited (Tr., p. 23):

"We hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, *we shall be deemed employees of said company*, for the purposes in said contract stated, and that we do agree to assume, and do *hereby assume all risk incident to such employment*, and that said company shall, in no case, be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employees."

Plaintiff *in his deposition* testified (Tr., p. 11) that he "rode in the car to look after the stock and to feed and water them and see that none of them got down in the car so that they could not get up or get hurt by others trampling on them while down," that the train employees knew he was in the stock car no one objecting. He described the accident thus (Tr., pp. 11, 12):

"I was injured a short distance from Longview, at about 5 o'clock p. m. on the 25th day of October, 1894; there is a steep grade near Longview, and the train stalled and the engineer, in trying to get headway, would back the train a short distance and then start up with a terrible jerk as he took up the slack of the

train ; my car was next to the caboose and received the full force of the jerk and threw several of my cows down and the horses on top of them ; the jar broke the halters that held horses ; I saw they were being killed by the repeated jerks and I climbed in the trough (I was afraid to get in where they were in any other way) and held on to the side of the car ; while in that position they uncoupled the train and took a part of it up the grade, leaving my car stationary for a time ; I then managed to get the stock all up, and was still holding on to the side of the car and up in the feed-trough, when the engine came back against the train, without my knowing that it was coming, with such force as to throw me out of the trough, but I held on to the side of the car, knowing that if I got under my stock I would be killed. The car jerked my arm out of place in the shoulder joint. Soon afterwards I called the conductor and he came to my assistance," &c. * * *

" The engine came back against the car with great force and then plunged forward, taking up the slack, and jerked the car I was in with such force as to hurt me as already stated. I was up in the feed-trough, and was just going to get down, when the jerk came, and was entirely unexpected to me. The jolt was worst I had experienced, and many others after leaving Texarkana were severe enough to throw the stock off their feet and kept me busy in getting them up. The stock had been thrown down by previous jerks in trying to get up the grade, and I had just gotten them on their feet again when I was hurt ; the halters of the horses were broken and the horses were thrown on the cattle, and unless they were all gotten up and in place they would be killed or greatly injured ; I was holding on to some iron on the side of the car, and the great jerk pulled my right arm out of socket."

When *on the stand* he testified (Tr., p. 16) :

" Just before I was injured the jar knocked three cows down, and two of the horses fell on top of them, and when the car stopped I got down in front to get them up again and after I got them up I was going back to take the seat again, and when I got about a foot from the end a jar came and knocked me off my feet, and I grabbed hold of some iron, and that swung me back this way until they got started all right, and

after they got started on the run, and then I got down and got on my feet again; as soon as they stopped again I called to the conductor and brakeman."

On cross-examination (Tr. p. 17):

"I had a good seat in the corner of the car, and I sat on it when I wanted to. I was in the trough when I got hurt."

Defendant's witnesses, the conductor, engineer and two brakemen of the train, testified that they did not "double" (*i. e.*, separate the train and take one section at a time up the grade) on the day plaintiff was hurt between Marshall and Longview, but did "double" east of Marshall and that the trip was of the usual character and without unusual incident.

Both the conductor and the brakeman said they had warned plaintiff that the caboose was a safer place for him to be in than was the stock car, and requested him to ride in the caboose (Tr., pp. 18 20). To the conductor's request plaintiff replied (Tr., p. 18) that "it was inconvenient for him to get in and out of the car to attend to his stock, and he would rather ride in the car with his stock." His answer to the brakeman was (Tr., p. 19) that he "would rather ride in his car with the stock."

Defendant's witnesses also testified that *plaintiff would not have been hurt had he been in the caboose* (Tr., pp. 18, 20).

There was a verdict and judgment for plaintiff in the sum of $1,500. The judgment was reviewed and affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, and from the judgment of the latter Court a writ of error has been prosecuted to this Court.

Assignment of Errors.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Upon the law and the facts in this case the plaintiff cannot recover, and you are instructed to return a verdict for the defendant,"

because the plaintiff assumed the risk and by riding in the stock car instead of the caboose, which he was invited to ride in and which was prepared for his transportation and in which he would not have been hurt, was guilty of contributory negligence, and upon all the evidence he was not entitled to recover.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said court committed no error in that portion of its main charge which is as follows:

"If you believe from the evidence that the plaintiff Alexander Reeder was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was

stationary, his cattle being down and needed his attention, he, at that time, in a prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the car in which he was riding through and by the negligence of the defendant company or its operatives, you will find for plaintiff,"

because it was not qualified by the doctrine of assumed risk and contributory negligence of the plaintiff in riding in the stock car instead of the caboose, which was a safer position and where he would not have been hurt.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court of the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error which is as follows :

"If you find from the evidence that the plaintiff would not have been hurt if he had rode in the caboose instead of the stock car, you will find for the defendant,"

because the caboose was the proper car for the plaintiff to ride in, and where he was invited to ride by the operatives of the defendant, and where his drover's pass required him to ride, and where he would not have been hurt if he had done so.

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said

Court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"If you find from the evidence that the plaintiff, Alexander Reeder, rode in the stock car with his cattle and goods, and that a caboose was attached to said train, and the conductor or operatives of said train invited the plaintiff to ride in said caboose, and that the caboose was a safer place to ride in than the stock car, you will find for the defendant company."

because, if the plaintiff voluntarily or for his own convenience rode in the stock car when a caboose was provided for him, he thereby contributed to his own injury, and assumed all risk in taking the more dangerous position in the stock car, which was proved by the uncontroverted evidence in the case.

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"If you find from the evidence that the caboose was a safer place to ride in than the stock car and the plaintiff knew it, or could have known it by the use of ordinary diligence, the plaintiff cannot recover, and you will find for defendant company,"

because it was established by the undisputed evidence that the caboose was a safer place, and the plaintiff was requested by the operatives to ride in the caboose, and he was guilty of contributory negligence by riding in the stock car.

ARGUMENT.

I.

Upon the undisputed facts of this case the trial Court erred in not directing a verdict for the defendant.

In *Union Pacific Railway Co. vs. McDonald*, 152 U. S., 262, 283, Mr. Justice HARLAN, following a long line of decisions, thus tersely stated the rule in such cases:

"Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it (Delaware, Lackawanna, &c., Railroad vs. Converse, 139 U. S., 469, 472, and authorities there cited: Elliott vs. Chicago, Milwaukee & St. Paul Railway, 150 U. S., 245; Anderson County Commissioners vs. Beal, 113 U. S., 227, 241)."

Mr. Justice WHITE, in *Southern Pacific Co. vs. Pool*, 160 U. S., 438, 440, quoted the above extract as a correct statement of the law, preceding it with the remark:

"There is also no doubt when the facts are undisputed or clearly preponderant that the question of negligence is one of law."

Cases in which the rule has been approved or applied are:

Griggs vs. Houston, 104 U. S., 553.
Randall vs. Baltimore & Ohio Ry. Co., 109 U. S., 478.
Goodlett vs. Louisville & Nashville Rd., 122 U. S., 391.

Delaware, &c., R. Co. vs. Converse, 139 U. S., 469.
Grand Trunk, &c., vs. Ives, 144 U. S., 408, 417.
Washington & Georgetown Rd. vs. Harmon, 147 U. S., 571, 580.
Richmond & Danville Rd. vs. Powers, 149 U. S., 43, 45.
Elliott vs. Chicago & Milwaukee Ry., 150 U. S., 245, 246.

Mr. Justice LAMAR, discussing the terms "ordinary care," "reasonable prudence" and the like, said, in *Grand Trunk Ry. Co. vs. Ives*, 144 U. S., 408, 417:

"It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court" (citing cases).

And this was repeated in *Texas & Pacific Co. vs. Gentry*, 163 U. S., 353, Mr. Justice HARLAN rendering the opinion.

In view of the law as thus announced, it becomes necessary to examine the record and determine therefrom whether or not the trial Court should have granted defendants' request for the direction of a verdict in its favor.

The question is presented by the second assignment of error.

We sincerely believe, and confidently claim, such an examination will show that the facts were "undisputed, and of such a conclusive character," that "reasonable men must draw the same conclusion from them;" and that the trial Judge should have held as a matter of law that the injury sustained by plaintiff was due to his own fault and negligence, and to that only, and that the risk of injury was voluntarily assumed by him.

The following facts seem to us to be established by uncontradicted testimony :

1. That plaintiff on the day he was injured was traveling over a part of defendant's railway on a "Drovers' Pass," by the terms of which he was required to ride in the "caboose" car while the train was in motion.

2. That a caboose was provided for his use and was placed next to his stock car for his better accommodation.

3. That he did not ride in the caboose at all, but by preference rode in the stock car with his cattle and horses.

4. That he was requested by the conductor and brakeman at different times to ride in the caboose, which was provided for that purpose and was the proper place for him under his contract, but declined to go there, saying he would rather ride with his stock.

5. That he was told by both the conductor and brakeman that the caboose was a safer place for him to be in than was the stock car.

6. That he would not have been injured if he had been in the caboose instead of in the stock car.

7. That the accident did not occur at a station or at a place where he could reasonably expect the train to stop for any purpose ; and

8. That he fully knew the dangers attending his presence in the stock car, and voluntarily assumed the risk resulting therefrom.

Upon these facts, which we insist are not controverted, it was clearly the duty of the trial Judge to instruct the jury to render a verdict for the defendant, and, in support of this contention, we call the attention of the Court to its own decisions in cases where the facts were, to all intents and purposes, on all fours with those in the case at bar.

CASES ON ALL FOURS WITH THE CASE AT BAR.

In *St. Louis, &c., Railway vs. Schumacher*, 152 U. S., 77 (1894), Mr. Justice BROWN rendered the opinion of the Court. It is as follows :

" The testimony showed that plaintiff was employed as a common laborer by defendant ; that it was his duty to assist in loading cars with gravel and then ride down on the train to that portion of the track where the gravel was to be used, and there to assist in unloading and placing the gravel between the ties. At the time of his injury plaintiff was sitting on the end of a loaded flat car next to the caboose, with his feet hanging over the side of the car. The train had stopped at Talihina, a station between the gravel pit and its destination, to take up ten additional carloads of gravel, which were standing upon a side track, the original train consisting of four cars and a caboose. On arriving at Talihina, the engine left the cars and caboose on the main track, went in on the siding, coupled on thirteen cars that were standing on the side track, three of which next the engine were not wanted. When the engine and thirteen cars got on to the main track, the ten cars that were wanted were cut loose from the engine and allowed to go down the grade. The grade proved to be a little steeper than the brakeman in charge of the cars supposed, and, to use his own words, ' The cars got the start of me a little, and when I saw they were going to hit a little too hard, I halloaed to the men " look out." I saw they were going to hit harder than I thought, harder than cars ought to strike in making a coupling.' They came in contact with that portion of the train on which plaintiff sat with a violent jar or shock, which caused him to lose his balance, fall with his feet upon the track, when the wheels passed over a portion of his right foot, necessitating amputation.

"The testimony showed that the train was manned by the usual complement of trainmen—namely, a conductor, two brakemen, an engineer and a fireman—and that each was competent. At the time of the injury the conductor was near the forward end of the four stationary cars for the purpose of making the coupling. The engineer and fireman were in their proper positions upon the engine. One brakeman was with the engine and three cars, which were being replaced on the sidetrack, and the other was on the ten cars which were to be attached to the train. There was no evidence of any defect in the brakes, machinery or appliances, or any failure to make or enforce suitable regulations, and these issues were not submitted to the jury. There was evidence tending to show that the place where the plaintiff sat when he fell was a dangerous place to be in when cars were being coupled, and plaintiff testified that he knew that they were about to couple some cars, but was not watching and did not see the other cars come down. There was evidence tending to show that both the brakemen and the foreman shouted to the men on the flatcars to look out, and that they were distinctly heard by persons in a less favorable place to hear than the plaintiff. There was also evidence tending to show that the men had been warned by their foreman and by the trainmaster not to ride on the flatcars, but to ride in the caboose, and that the conductor had told the same gang of laborers of that morning that they had better ride in the caboose, and that there was plenty of room there. There was also testimony that the men often rode on the flatcars with the knowledge of the foreman and conductor.

"The gist of all this testimony is that, notwithstanding the foreman and the train master had warned the men not to ride on the flat cars, and had provided a caboose in which he was told it was safer to ride, plaintiff selected a place he knew to be dangerous when cars were being coupled; sat with his legs hanging over the side of the car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he. Under such circumstances, he has no right to call upon the company to pay him damages. Had he been riding in

the caboose, he would have been safe. Had he taken the precaution to notice what was going on, he could not have failed to see that a collision was imminent, and could have jumped off. The only negligence chargeable against the defendant was in backing the train down at too great speed. But, giving to his own conduct as well as that of the defendant the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury. There was no negligence by the defendant shown as occurring subsequent to the negligence of the plaintiff, since his negligence was continuous down to the moment of the injury. Neither was there any evidence of a wilful or intentional negligence on the part of the defendant for the purpose of injuring the plaintiff. None such was averred in the complaint, and none such was shown in the testimony. The case of Railroad Co. vs. Jones, 95 U. S., 439, is directly in point, and is decisive of this. See, also, St. Louis and San Francisco Railway vs. Marker, 41 Arkansas, 542; Glover vs. Scotten, 82 Michigan, 369."

In *Railway Company vs. Jones*, 95 U S., 439 (referred to, followed and applied by this Court in the case last cited), the facts as shown by the record were these: Plaintiff was engaged as a laborer in constructing and keeping in repair the roadway of the railway company. The company usually conveyed the laborers to and from their work, sometimes in a car, and sometimes with only an engine and tender. It was a common thing for some of them to ride on the pilot or bumper in front of the engine, in either case, and this was done with the approval of the conductor. On the day plaintiff was injured the train consisted of an engine, tender and box-car. Plaintiff was told by the conductor to jump on anywhere, as they were in a hurry. Plaintiff rode on the pilot; there was a collision in a tunnel and he was injured—only plaintiff and another man on the pilot being hurt. It also appeared that the box-car had been used on the train six weeks or more,

and that the conductor when it was first used, and on several later occasions, had notified the laborers they must ride in the car and not on the engine; that plaintiff had been forbidden to ride on the pilot, and that he was there on this occasion without the knowledge of defendant's agent. There was room for him in the car, and if he had been there he would not have been hurt.

Mr. Justice SWAYNE, on behalf of the Court, said (p. 442):

"One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened."

* * * * * *

"The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little if not less time than it took to climb to the pilot. The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. With-

out the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down (Hickey vs. Boston & Lowell Railroad Co., 14 Allen (Mass.), 429; Todd vs. Old Colony R. R. Co., 3 *Id.*, 18; s. c., 7 *Id.*, 207; Gavett vs. M. & L. R. R. Co., 16 Gray (Mass.), 501; Lucas vs. N. B. & T. R. R. Co., 6 *Id.*, 64; Ward vs. Railroad Company, 2 Abb. (N. Y.), Pr., n. s., 411; Galena & Chicago Union R. R. Co. vs. Yarwood, 15 Ill., 468; Doggett vs. Illinois Central R. R. Co., 34 Iowa, 284."

This decision was followed by the Circuit Court for the District of Minnesota in *Kresamorski vs. Northern Pac. R. Co.*, 17 Fed. Rep., 229.

See, also,

Pennsylvania R. Co. vs. Langdon, 99 Pa. St., 21, 27.

Houston, &c. R. Co. vs. Clemmens, 55 Tex., 89.

Kentucky Central R. Co. vs. Thomas, 79 Ky., 160.

Railway Co. vs. Lane, 83 Ill., 478.

Railway Co. vs. Watson, 93 Ky., 654.

Railway Co. vs. Sweep, 57 Ark., 287.

The request of defendant that the Court instruct the jury to render a verdict in its favor should have been granted.

II.

If the trial Court did not err in refusing to direct a verdict for the defendant on the evidence, its refusal to submit to the jury the evidence as to the defenses of contributory negligence and assumed risk was clearly error.

When the evidence was all in and the case ready for the jury the Court charged as follows (Tr., p. 25):

"My view of this case, gentleman, is not in accordance with the position assumed by the attorneys, either for plaintiff or the defendant in this case, and I charge you that there is but one theory of the law of this case by which the plaintiff can recover, and that is as follows:

"If you believe from the evidence that the plaintiff Alexander Reeder was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was *stationary*, his cattle being down, and needed his attention, he, at the time, in a prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed."

Defendant excepted to this charge as appears in the third assignment of error.

It is always dangerous for a court to strike out new paths not seen by counsel on either side, and this case is no exception to the rule.

The Court also charged (Tr., pp. 25, 26):

"If, however, you believe from the evidence that at the time the plaintiff was hurt that the train upon

which he was riding was in motion at the time he was giving the horses and cattle the assistance which they needed, the plaintiff would not be entitled to recover, and you will find for the defendant."

~~Exception to this charge was taken immediately, as is shown by the fourth assignment of error.~~

Defendant then asked the Court to give the charges contained in the fifth and sixth assignments of error--the fifth requesting the Court to charge on the defense of assumed risk and the sixth on the defense of contributory negligence. Both of those requests were refused and exceptions saved.

The Court will notice that the trial Judge did not construe the contract under the conditions of which plaintiff was traveling, as to the phrase, "while the same [the train] is in motion," and that it did not in terms or in any fair manner direct the jury to make its own construction of that phrase.

In the first part of the charge, quoted above, the Court practically and in effect told the jury to find for the plaintiff if they found that the train was "*stationary*" when the accident occurred; and, in the second part of the charge, also quoted above, it instructed them in so many words that if they found the train was *in motion* at the time they should find for defendant.

If this was intended by the Court to be a statement of the meaning of the contract, it is, as we submit with due respect to the trial Judge, totally erroneous. It is not possible that the plaintiff could have sustained the injury complained of if the train was "*stationary*." Here is where the Court's newly discovered "view" led the Court into a region of fog and quagmires. There must have been *some motion* to have

caused the injury. Plaintiff certainly thought there was motion in the train at the time, and so testified. The jury certainly ignored all the evidence when it found that the train was *stationary* at the time, as is involved in their verdict. The case was submitted to the jury on a hypothesis which had no foundation in fact. The train was not "stationary" in fact. On the contrary, it was "in motion" both in fact and within the meaning of the special contract between the plaintiff and the railroad company. By that contract on the admitted and undisputed facts, the company was not liable, and the Court's "view" of the case was entirely misconceived.

The instruction or charge of the Court under review was, as we submit, wholly erroneous, for the reason that a reasonable interpretation of the contract would require the holder of it to remain in the caboose except when the train was *at stations*, or, at the utmost, when it was at other places where, under all the circumstances, the passenger *had reason to believe that it would not resume its journey* for a time sufficient for him to care for his stock.

If this interpretation is correct, as we believe it is, and plaintiff had traveled in the caboose at all, and gone into the stock car at any point between stations, the question whether, in doing so, he had assumed the risk contemplated in the contract or had been guilty of contributory negligence, would properly have been submitted to the jury. But here plaintiff had violated the terms of his contract from the very beginning of his journey, and, as his own testimony shows, voluntarily remained in a place where he had no right to be, and in spite of earlier experiences which had vividly brought to his knowledge the danger attending his presence

there. He preferred, as he said, to ride in the stock car to look after his stock even after he had been requested to go into the caboose and told that it was a safer place for him.

That he knew his presence in the stock car was dangerous to himself is proved by his own testimony. He said (Tr., p. 11) that after leaving Texarkana the stock had been repeatedly thrown down ; that on two or three of these occasions he had asked the brakeman to request the engineer to use more care ; that he was afraid to get in where the horses and cattle were in any other way than by climbing into the feed trough ; that he knew he was in danger of being killed; and, notwithstanding all these experiences, he persisted in remaining in the stock car, persisted in staying there after he had been requested to go into the caboose provided for his use and which his contract contemplated he would use at such a time, and after he had been told it was a safer place for him. According to his own testimony, immediately before the accident his cattle had been thrown down, he had raised them to their feet, had resumed his place of fancied security on the feed trough, and was awaiting the catastrophe which resulted so unfortunately for him.

However much we may sympathize with plaintiff in his misfortune, and applaud his desire to protect his animals from injury, assuming that in doing so he was actuated by kindly motives and not by mere self interest, the fact remains that as between him and the railway company in this action he was guilty of contributory negligence in being in the stock car under the circumstances described by him in his testimony.

Even if the trial Court was right in refusing to direct a verdict for defendant (which we believe to be error

as we have claimed), there certainly was sufficient evidence of contributory negligence on the part of plaintiff, and of his having assumed the risk of injury by his conduct, to require the Court to submit those questions—and they comprised all the defenses of the railway company—to the jury. This was not done. The attention of the jury was directed to the evidence of negligence of the defendant when the train was stationary, but not a word was said to them as to the contributory negligence of the plaintiff nor as to his having assumed the risk under his contract for transportation, and these were the issues in the case as fully and completely as was the negligence of the defendant.

By way of recapitulation. The charge to the jury completely ignored the facts and circumstances connected with plaintiff's cattle being down and needing attention, and the further fact that plaintiff was aware that the train had not stopped at any station. He testifies himself that the engineer had cut part of the train loose and pulled it up the hill, and then backed his engine against the remaining part to pull it up the hill, and that it was the jerk it received when the engineer started, and when he coupled on, that caused his injury. It completely took away from the jury the question of fact whether or not Reeder was guilty of negligence in attempting to administer to his cattle under the peculiar circumstances existing at the time and which caused the train to be stationary. It further took away from the jury the consideration of the fact that Reeder was in a trough at the time he was hurt, and that his reason for being there was that he was afraid he would be trampled upon by the cattle. It

took away this fact from their consideration as a circumstance showing that Reeder knew that the car was likely to be moved at any moment. The charge further failed to permit the jury to take into consideration the *failure of plaintiff to allege that the train was stationary* at the time he attempted to assist his cattle, and that the defendant or its servants knew, or, by the exercise of ordinary care, could have known, that he was engaged in administering to his cattle at the time the engine came back for the remainder of the train.

The record discloses that the defendant pleaded and relied upon both the defenses of contributory negligence and assumed risk. The evidence shows that plaintiff was fully advised it was more dangerous to ride in the stock car with his cattle than in the caboose, and that if he had been in the caboose *he would not have been hurt;* that plaintiff considered his stock in danger of being killed on account of the jerking and jolting, and with full knowledge of this fact he put himself in peril for the purpose of protecting his stock. By the record it appears, as above stated, not only that the defenses of contributory negligence and assumed risk were properly pleaded, but that there was ample testimony to support them. Yet, in view of all these facts, the Court expressly refused to charge the jury, or to submit to the jury any charge whatever, either upon contributory negligence or assumed risk. The only issue submitted to the jury by the Court's charges is that if plaintiff, in a prudent and careful manner, attempted to give the horses and cattle needed assistance while the car was *stationary*, then the defendant was liable. We submit that the prudent or careful manner in which plaintiff administered to his cattle had nothing to do with the ques-

tion of his recovery or of defendant's liability. It was his negligence *in the selection of the time in which to administer to the wants of his cattle* which was in issue, and that question the jury should have been allowed and required to consider. It made no difference to the defendant whether he administered to his cattle in a careful manner or in a prudent manner or not, but the question of his negligence turns upon the fact as to whether or not he selected *a proper time* in which to perform this work, and that was a question to be submitted to the jury under the facts and a proper charge under the plea of contributory negligence. We insist that there was ample evidence to support the defenses of contributory negligence and assumed risk, and that these issues should have been submitted to the jury.

Under the rule as stated by this Court in the cases cited under the first point of this brief the trial Court had but two alternatives in charging the jury in this case. Either the jury should have been instructed, as we insist should have been done upon the evidence, to find a verdict for defendant, or the questions relating to contributory negligence and assumed risk should have been submitted to them.

As that Court failed and refused to do either, the judgment below must be reversed and a new trial ordered.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

APPENDIX.

The opinion of the Circuit Court of Appeals in this case not being in the printed transcript of record we reproduce it here, as we find it reported in 76 Fed. Rep., 550, 553:

CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT (AUGUST 4, 1896).

TEXAS & PACIFIC RY. CO.,

vs.

ALEXANDER REEDER.

Before MCCORMACK, Circuit Judge, and SPEER and PARLANGE, District Judges.

[NOTE.—Assignment of error No. 1, referred to in this opinion, was that the trial Court erred in admitting the deposition of plaintiff to be read when he was present in Court.]

"PARLANCE, District Judge (after stating the case as above). I take it to be clear that plaintiff in error has abandoned the assignment of error No. 1. The language of the brief for plaintiff in error (page 3) can have no other meaning. (See American Fiber Chamois Co. vs. Buckskin Fiber Co., 18 C. C. A. 662, 72 Fed., 508.)

"Assignment of error No. 2, which addresses itself to the refusal of the trial Judge to direct a verdict in favor of the railway company, is without force. The reason given for asking a peremptory instruction shows that the request was based upon the erroneous theory that Reeder was bound to remain constantly in the

caboose without regard to the fact whether the train was in motion or not. It is, of course, evident that if Reeder had ridden in the caboose during the whole trip the particular accident which befell him would not have happened; but, under the contract, he had the right to care for his stock, and the only restriction which the company placed upon his actions in that respect was that he should not attend to the stock while the train was in motion. This case was clearly not one in which it would have been proper for the trial Judge to have directed a verdict. There was a conflict of evidence, and sufficient testimony if believed by the jury to sustain a verdict in favor of Reeder. The credibility of witnesses is matter for the jury.

"All the other assignments of error are, in the same manner as assignment of error No. 2, open to the fatal objection that they assume that Reeder had no right to leave the caboose; whereas, if the car was stationary and his cattle needed attention and he proceeded to care for them in a prudent manner, and he was then injured by the fault of the railway company, there is nothing in the law or in the contract to prevent him from recovering.

"The charge of the trial Judge stated the issues and the law fairly and clearly. The question of fact was left to the jury as it should have been. There is no error in the case, and for the foregoing reasons I concur in the judgment of the Court affirming the judgment of the lower court."

No. 208.

Brief of Counsel for Defendant-in-Error.

Term No. 208.

Filed Dec. 23, 1897.

(Case No. 16347.)

In the United States Supreme Court,

October Term, 1897.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff-in-Error.*

versus

ALEXANDER REDDIN, *Defendant-in-error.*

Error to United States Circuit Court of Appeals, Fifth Circuit.

BRIEF FOR DEFENDANT-IN-ERROR,

—BY—

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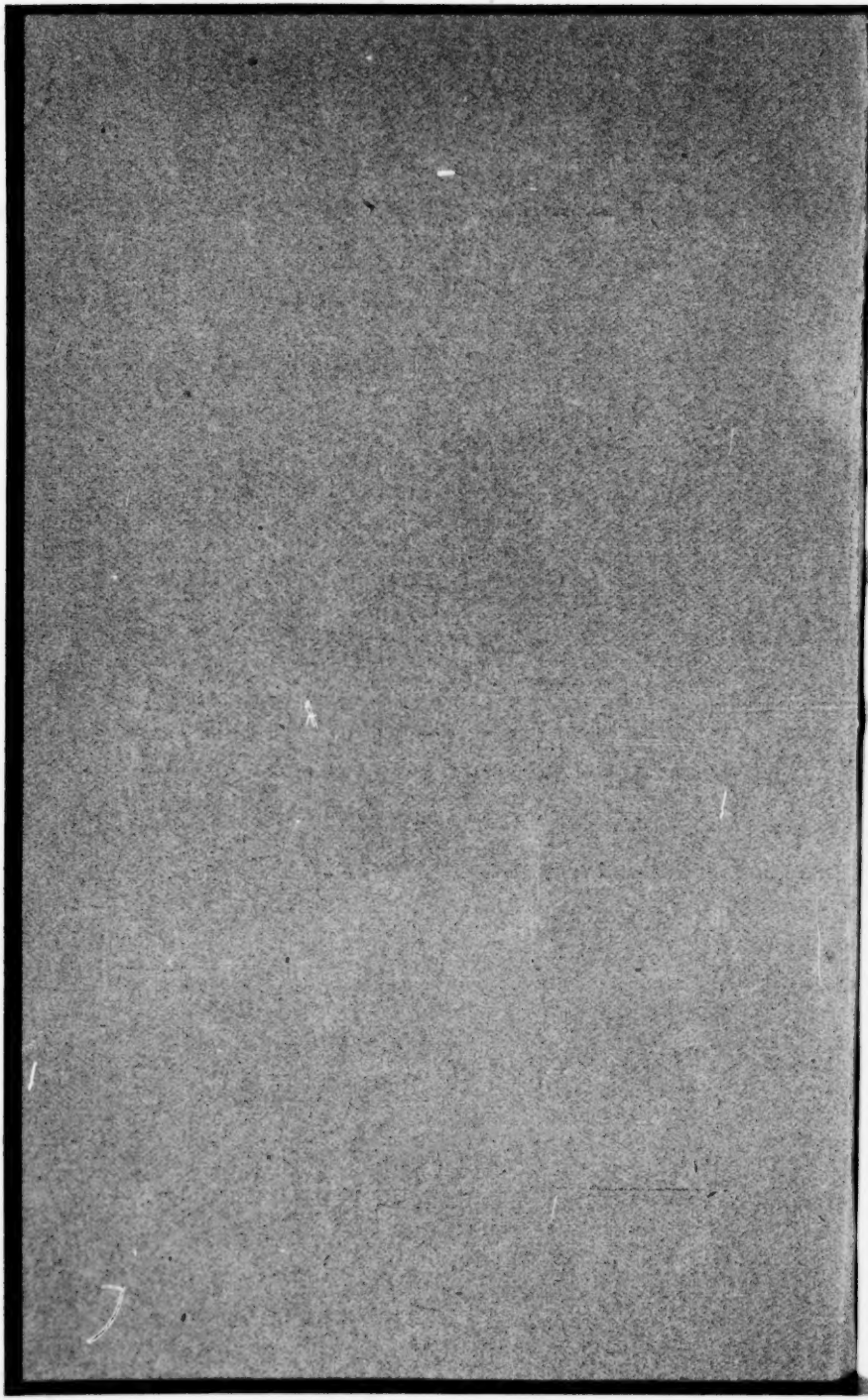

(Case No. 16347.)

In the United States Supreme Court

October Term, 1897.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff-in-Error.*

versus } Term No. 208.

ALEXANDER REEDER, *Defendant-in-error.*

Error to United States Circuit Court of Appeals, Fifth Circuit.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of the Case.

The defendant-in-error, Alexander Reeder, was the shipper from Scottsville, Kansas, to Houston, Texas, of a car-load of stock, consisting of three horses, two mules and five cows, a lot of household goods being also carried in the car; he accompanied the stock, riding in the car with them, and sleeping in course of transit on a suspended cot. This was usual, and was done with the acquiescence of the conductor and train crew, though they appear to have invited him to occupy the caboose. The defendant-in-error rode on a drover's pass that appears to have been attached to the bill of lading, and to have formed a part of its consideration. In the course of transit, the stock passed over the railroad of the plaintiff-in-error, one of the connecting lines, from Texarkana to Longview, Texas. The stock reached Texarkana in good condition.

While there was a conflict in the evidence, that for the defendant-in-error was positive to the effect that, on the plaintiff-in-error's line of road, after leaving Texarkana, the cattle and horses were thrown down a number of times, through sudden and unnecessary jerks made by the engine, and that this continued, notwithstanding remonstrance and notice by defendant-in-error to some of the train crew; that in the afternoon of the third day of the journey, to wit: October 25, 1894, the train, on reaching a steep grade near Longview, was subjected to such terrible jerks and jars, repeatedly made, that the halters which held the horses were broken and several of the cows thrown down with the horses on top of them, and while the stock were in that condition, defendant-in-error undertook to give assistance to them lest they be killed, climbing with a view to safety in a trough several feet from the floor, and holding to the side of the car. Being in that position, the verdict affirms upon a conflict of evidence, that while defendant-in-error was thus, in a prudent and careful manner, attempting to give needed assistance to the stock, the train gave a sudden and unusually hard jerk, or jolt, or bumping of the car in which he was riding, through the negligence of the operatives of the train, in consequence of which the plaintiff-in-error, while holding on to an iron on the side of the car, had his right arm pulled out of socket at the shoulder, causing the muscles to perish away, producing partial paralysis, and inflicting upon him permanent and painful injury, for which, on the

trial, to wit: February 4, 1896, the jury awarded as compensation the sum of $1500 (Rec., 10, 13, 15, 16, 18–20, and 9–10).

The stock contract imposed the risk and duty upon defendant-in-error of giving all needed attention to the stock, including "feeding, watering, bedding, and *otherwise caring for the live stock covered by this contract while in cars;* and it is provided that the person in charge of the stock should remain in the caboose car attached to the train while the same is *in motion*" (Paragraphs 3 and 9 of contract, Rec., 21, 22). A witness for plaintiff-in-error testified that it was customary for the man in charge of stock, "when the train stops, to go out and look after his stock" (Rec., 20, line 10). While there was some conflict, the positive evidence for the defendant-in-error was, that he never tried to get his cattle up while the train was in motion, but waited until the train stopped, and could not have gotten them up while the train was in motion by reason of the narrowness of the trough in which he was standing (Rec., 25).

The court held, as matter of law, that defendant-in-error could not recover if he was assisting his cattle *while the train was in motion*, but that, if he was not, and was injured while, in a prudent and careful manner, attempting to give the stock needed assistance, through the negligence of the train's operatives, by a sudden and unusually hard jerk or jolt or bumping of the car in which defendant-in-error was riding, then he was entitled to recover. This was the sole issue

submitted by the charge (Rec., 25–30). Judgment for plaintiff was, on error, affirmed by United States Circuit Court of Appeals, Fifth Circuit, and the record brought here by writ of error to that court (Rec., 35–37).

The assignments of error in said court of appeals raised practically three questions for decision:

1. Was it error to permit the deposition of the defendant-in-error, who was present in court at the time, to be read in evidence, he afterwards testifying in person?

2. Was the plaintiff-in-error entitled to a peremptory instruction on the ground that the defendant-in-error, as matter of law, assumed the risk of riding in the stock car instead of the caboose, and was guilty of contributory negligence in so doing?

3. Did the court err in refusing special charges to the effect that defendant-in-error could not recover, if he would not have been hurt had he been riding in the caboose, or if the caboose was a safer place to ride in than the stock car, or if it was a safer place, and defendant-in-error knew, or was chargeable with knowledge of such fact?

The assignments of error in this court raise the same questions, except that the first would seem to have been waived (Rec., 29, 36); and we shall, therefore, here submit the same brief of the argument as was submitted in said court of appeals, with proper modification of references to the record.

BRIEF OF THE ARGUMENT.

I.

The action of the trial court in permitting the deposition of the witness present at the trial to be read, was a purely discretionary matter not open to review. But if it were otherwise, the witness having afterwards testified in person, subject to cross-examination, no possible injury could have resulted.

The deposition was taken before the cause was removed from the State court (Rec., 10, 6); besides, the witness resided at Beloit, Kansas, more than a hundred miles from the place of trial (Rec., 10). In O'Connor v. Andrews, 81 Tex., 29, it was ruled that the matter of permitting the deposition of a witness, who is present at the trial, to be read, rests with the discretion of the court, citing Schmick v. Noel, 64 Tex., 406. It is familiar that the Federal courts will not review on error matters resting within the discretion of the inferior courts, such as matters of practice. Barrow v. Hill, 13 How. (U. S.), 54; Parsons v. Bedford, 3 Pet. (U. S.), 434; Sun Sheong-Kee v. The United States, 3 Wall., 320 (L. Ed., 72).

II.

Clearly, there was no error in denying the peremptory instruction for the plaintiff-in-error, since the evidence for the defendant-in-error was abundantly sufficient to warrant the finding that he was injured through the negligence of the operatives of the train, and without contributive negligence on his own part.

It was the right and duty of the defendant-in-error, as we have seen, to give his stock the needed care and attention (Rec., 21). The court below held, in effect, that defendant-in-error's right to recover was defeated, as matter of law, by voluntary assumption of risk and contributive negligence on his part, if he was at the time giving attention to the cattle *while the train was in motion* (Rec., 25). If the train was not thus in motion at the time, manifestly there was no issue upon the evidence, based upon not riding in the caboose, of voluntary assumption of risk or contributory negligence (Rec., 10–25). Therefore, if there was evidence that the train was not in motion at the time, the refusal of the peremptory charge was unavoidable. The provision in the stock contract that defendant-in-error should be treated as an employe was ineffectual to change his real relation (Railway Company v. Ivy, 71 Texas, 409), which was that of a passenger so far as concerned the duty of care towards him (Railroad Company v. Horst, 3 Otto, 291; Railroad v. Lockwood, 17 Wall., 357; Railway Company v. Garcia, 62 Tex., 285; Railway Company v. Aiken, 71 Tex., 373; Railway Company v. Cole, 8 Tex. Civ. App., 635). The occasion of defendant-in-error's attention to his stock at the time, was the failure of duty by plaintiff-in-error to avoid abruptly throwing the stock down and injuring them (Railway Company v. Ellison, 70 Tex., 491). The negligence of the operatives of the train, to the injury of the defendant-in-error, while he was attending to his stock, was action-

able. Receiver's Railway Company v. Armstrong (Tex. Civ. App.), 23 S. W. Rep., 236, and cases cited. It follows that the case was one for liability, *unless the train was in motion* at the time the defendant-in-error undertook to give attention to his stock. There was a conflict of evidence on this point. One or two of the train crew testified to an admission by defendant-in-error that the train was in motion at the time (Rec., 18–20). The plaintiff-in-error, on the other hand, testified: "I never tried to get my cattle up that day while the train was in motion, and I made no such statement to the brakeman or conductor; I did not try to get them up while the train was in motion, because the trough was so narrow that I could hardly get along it, and I would wait till it stopped" (Rec., 25). In returning a verdict for the defendant-in-error, the jury necessarily, under the court's charge, found the issue of fact in his favor (Rec., 25). As said by Mr. Justice Bradley, in Dirst v. Morris, 14 Wall., 490, "This court, sitting as a court of error, can not pass, as it does in equity appeals, upon the weight and sufficiency of the evidence." The case then obviously comes to this, that as the verdict affirms due care on the part of defendant-in-error at the time he was hurt, there was no question of contributory negligence or voluntary assumption of risk in the case *if the train was not in motion* when defendant-in-error undertook to give his stock the needed attention, and the verdict, upon sufficient evidence, affirms that the train was not in motion at that time.

III.

The special charges were erroneous in assuming that the train was in motion, and in ignoring the defendant-in-error's right and duty to give attention to his stock when the train was not in motion. These instructions were grounded upon the theory that the train was in motion, and as the court went further, and denied recovery as matter of law, if the train was in motion, the special charges, if abstractly correct, could have served no useful purpose, and would have tended to mislead or confuse the jury.

What is said under the second proposition, *supra*, makes the way clear in this connection. It has been seen that contributory negligence and voluntary assumption of risk had no place in the case, unless the train was in motion at the time defendant-in-error undertook to give attention to his stock, as the verdict affirms due care on his part at that time. Since it was clearly the right and duty of defendant-in-error, if riding in the caboose, to go into the stock car, and there give his attention to his stock when the train was not in motion, it follows that the failure to ride in the caboose had no lawful connection with the injury; provided, the train was not in motion when defendant-in-error undertook to give his stock the needed attention. The court's charge having denied recovery if the train was in motion, the riding in the caboose no longer presented any issue of fact for the jury, and to have then qualified the charge relative to contributory negligence or voluntary assumption of risk, as based on that consideration, would have been to indulge a misleading abstraction, if not palpably erroneous. But

in respect to the exception to the charge of the court, it is enough to say that the charge was good law as far as it went, and if there was any omission, making a qualification necessary, it could only be supplied by request for special instructions (Weaver v. Nugent, 72 Tex., 278; Railway v. Helm, 64 Tex., 147; Rost v. Railway, 76 Tex., 172). This brings us to the special charges which were asked and refused. Each one involved the assumption of the controverted fact that the train was in motion, and ignored the right and duty of the defendant-in-error, if he had been riding in the caboose, to give needed assistance to his cattle when the train was not in motion. The charges, therefore, were not applicable to the facts of the case, were misleading in their tendency, if not positively erroneous (Lucas v. Brooks, 18 Wall., 436; Greenleaf v. Birth, 9 Pet., 292; Knickerbocker Life Ins. Co. v. Foley, 15 Otto, 350; Catts v. Phalen, 2 How., 376; Railroad Company v. Barnell, 8 Otto, 479). It is settled that unless a party is entitled to a special instruction in its precise terms, the court is not bound to give a modified instruction varying from the one prayed (Catts v. Phalen, 2 How., 376).

It is submitted that the case was well and fairly tried, and that there is not only no reversible error made apparent, but the record is singularly clear from the slightest deviation in the direction of error.

Respectfully submitted, with prayer for affirmance.

PRESLEY K. EWING,
HENRY F. RING,
L. S. SCHLUTER,
Attorneys for Defendant-in-Error, Alexander Reeder.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* REEDER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 208. Submitted April 15, 1898 — Decided May 9, 1898.

A provision in a contract, made with a railroad company for the carriage of live stock, that the person in charge of the stock shall remain in the caboose car while the train is in motion, is not violated by his being in the car with the live stock when the train is not in motion, even though he may have been in that car instead of in the caboose car when the train was in motion; and in case of an accident happening to him, while so in the cattle car, caused by a sudden jerk made when the train was at rest, his being in the cattle car at that time, and under such circumstances, does not make him guilty of contributory negligence.

THIS was an action originally instituted by Alexander Reeder against the Texas and Pacific Railway Company in the District Court of Marion County, Texas, to recover for personal injuries sustained by Reeder. The action was afterwards removed upon petition of the defendant to the United

Statement of the Case.

States Circuit Court for the Eastern District of Texas. The facts of the case were substantially as follows:

Reeder shipped from Scottsville, Kansas, to Houston, Texas, a car loaded with an emigrant outfit, consisting of ten head of live stock and of household goods, and accompanied the same upon a drover's pass. It was provided in the contract which he entered into with the railway company, that he should "assume all risk and expense of feeding, watering, bedding and otherwise caring for the live stock" while on the way, and to better care for the stock he rode in the car with them. In the ninth paragraph of the contract it was further provided "that the person or persons in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever."

The evidence shows that it was the custom on the road of the defendant company for stockmen to ride in the caboose, but that in a case of an "emigrant outfit," like the one in question, it was not unusual for the person in charge to ride in the car with the live stock. Reeder rode with the live stock during the whole trip, and although his car was next to the caboose, and he was invited by the conductor and trainmen to ride in the caboose, he declined for the reason that it would be inconvenient for him to get in and out of the car to look after his stock.

Reeder, whose age was about seventy, testified that he had travelled about five hundred miles over connecting lines before reaching the line of the defendant company, and in that distance neither his stock nor himself had sustained any injury. He further testified that during his whole trip on the line of the defendant his stock was roughly handled by the sudden stopping and starting of the engine, and had been knocked down at least eight times, and that his complaints to the trainmen that the jerks and jolts were killing his stock did no good. He also testified that at or about the place along the line of the road where he received his injury, called

Statement of the Case.

Longview, the train was stalled on a steep grade, and the engineer in trying to get headway would back the train a short distance and then start with a sudden jerk as he took up the slack of the train; that one of the jerks threw down three cows and two horses, whose halters had been snapped by the jerk; that the engineer uncoupled the train, taking part up the grade, leaving his car; that after the car stopped he got the stock up and was on his way back to his seat when the engine came back against the train with such a sudden jar that he was thrown off his feet, and to save himself he grabbed an iron support. It seems that the sudden jar or jerk pulled his right arm out of joint at the shoulder, which subsequently was followed by a partial paralysis of the shoulder muscles.

The engineer and others of the train crew testified that the train was not uncoupled at the place mentioned by Reeder, but was uncoupled at another place called Marshall, where there was a very steep grade. The witnesses for the defendant also testified that the trip was no rougher than usual, and one of the brakemen said on the stand that he was riding in the caboose at the time of the jerk which caused the injury, and that he did not suffer from it in any way.

After all the evidence was in, the defendant requested the court to charge the jury to return a verdict for the defendant. This the court refused to do, whereupon the defendant requested the court to charge the jury to find for the defendant in case it should find from the evidence that the plaintiff would not have been injured if he had been in the caboose instead of the stock car; that he was invited to ride in the caboose; that the latter was a safer place than the stock car, and that the plaintiff knew it. The court refused to grant any of the instructions requested by the defendant, and charged the jury as follows:

"If you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was stationary, his cattle being down, and needed his attention, he at the time, in a

prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time, by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives; you will find for the plaintiff, and assess actual damages as hereinafter instructed.

"If, however, you believe from the evidence, that at the time the plaintiff was hurt, that the train upon which he was riding was in motion, at the time he was giving the horses and cattle the assistance which they needed, the plaintiff would not be entitled to recover, and you will find for the defendant."

The jury returned a verdict for the plaintiff in the sum of $1500, upon which judgment was entered. The case was then taken to the Court of Appeals for the Fifth Circuit, 41 U. S. App. 775, where the judgment below was affirmed, and the case is now before this court on writ of error.

Mr. John F. Dillon, *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* for plaintiff in error.

Mr. Presley K. Ewing, *Mr. Henry F. Ring* and *Mr. L. S. Schluter* for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The several assignments of error in this case all resolve themselves into the two questions whether the defendant railway company was entitled to a peremptory instruction in its favor, or, in case of a refusal of such instruction, whether it was entitled to submit to the jury the question of the contributory negligence of the plaintiff in the mere fact of riding in the stock car.

In this connection defendant relies upon the ninth clause of the contract under which plaintiff was travelling and transporting his stock, which provided that "the person or persons

in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion." This clause was undoubtedly intended to provide a safe place for drovers in attendance upon their stock, although in the case of emigrants accompanying their outfits it was a common custom to permit them to ride in the car with their outfits. But, assuming that the plaintiff was bound by this stipulation, it was manifestly obligatory upon him only while the car was in motion, the design evidently being that drovers should be permitted to visit their stock cars and see to their cattle while the train was at rest. Indeed, the contract specially provided that the plaintiff should "assume all risk and expense of feeding, watering, bedding and otherwise caring for the live stock provided for by this contract, while in yards, pens or elsewhere." The stipulation was doubtless primarily intended to permit drovers to visit their stock cars while the train was stopping at its regular stations, but as there is no such limitation in the contract, we think the plaintiff was not guilty of contributory negligence in attending to his cattle whenever the train was not in motion, whatever may have been the cause of its stoppage, and whether the same occurred at a station or not. The company might doubtless have restricted the right of its drovers to visit their stock while the train was stopping at its regular stations, but it did not choose to do so, and there evidently was as much necessity in the present case for the plaintiff to care for his stock and to protect it against injury as there would have been if the train had been stopping at such a station.

If the plaintiff, while riding in a caboose, might, within the terms of the contract, have been visiting his cattle at the time the accident occurred, then the fact that he was actually riding in the same car with them while the car was in motion becomes immaterial, since the propriety of his action in being in the stock car must be gauged by the fact whether the train was in motion or not. Had the accident occurred while the plaintiff should have been riding in the caboose, that is, while the train was in motion, it would have been strong, if not conclusive, evidence of contributory negligence on his part.

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What then is meant by the train being "in motion"? The jar or sudden jolt which occasioned the injury doubtless presupposes a momentary motion of the car, but that is an extremely limited sense of the word, and one inconsistent with the obvious purpose of the license, since, while stopping at a regular station, freight trains are frequently subject to be moved short distances in order to drop off or take on cars, to be switched on side tracks in order to accommodate passenger trains, or to take on fuel or water. If cars were held to be in motion while making these trifling changes, the privilege of entering a stock car while the train was at rest would be of no practical value. The more reasonable interpretation is that by the word "motion," as here used, is intended that continuous movement of the cars towards their destination which is commonly understood when we speak of moving trains or trains in motion. Whether the train was really in motion was a question which was submitted to the jury, and we have no criticism to make of the instruction of the court in that particular: "That if you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over defendant's road, and that while the train was stationary, his cattle being down, and needed his attention, he at the time, in a prudent and careful manner, attempted to or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed."

Evidently the action of the plaintiff upon the occasion in question was entitled to some liberality of construction and was dictated by a manifest prudence for the care of his stock. In his deposition he states:

"My car was next to the caboose and received the full force of the jerk and threw several of my cows down and the horses on top of them; the jar broke the halters that held the horses;

I saw they were being killed by the repeated jerks and I climbed in the trough (I was afraid to get in where they were in any other way) and held on to the side of the car; while in that position they uncoupled the train and took a part of it up the grade, leaving my car stationary for a time; I then managed to get the stock all up and was still holding on to the side of the car and up in the feed trough, when the engine came back against the train without my knowing that it was coming with such force as to throw me out of the trough, but I held on to the side of the car, knowing that if I got under my stock I would be killed. The car jerked my arm out of place in the shoulder joint. Soon afterwards I called the conductor and he came to my assistance. . . . The engine came back against the car with great force and then plunged forward taking up the slack, and jerked the car I was in with such force as to hurt me, as already stated. I was up in the feed trough and was just going to get down when the jerk came, and was entirely unexpected to me."

When on the stand the plaintiff testified:

"Just before I was injured the jar knocked three cows down, and two of the horses fell on top of them, and when the car stopped I got down in front to get them up again, and after I got them up I was going back to take the seat again, and when I was about a foot from the end a jar came and knocked me off my feet, and I grabbed hold of some iron, and that swung me back this way until they got started all right, and after they got started on the run, and then I got down and got on my feet again; as soon as they stopped again I called to the conductor and brakemen."

The truth seems to be that the train was not provided with sufficient traction power, and that a stronger or additional locomotive should have been employed. If the train was not in motion when the accident occurred, we think that, in view of the obviously negligent conduct of the defendant, motives of humanity as well as of prudence may have required of the plaintiff more than ordinary care in looking after and protecting his stock.

The company was evidently not entitled to an instruction

that plaintiff, by riding in the stock car while the train was in motion, was guilty of contributory negligence, or even to go to the jury on that point. The real question was whether the train was actually in motion when the injury was received, and, if there was any error at all in submitting that question to the jury, it was not one of which the defendant was entitled to complain.

There was no error in the action of the Court of Appeals, and its judgment is, therefore,

Affirmed.

Mr. Justice White dissented.